Supercession and Subversion: Limitations on State Power To Deal With Issues of Subversion and Loyalty

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In the decade or more since the end of World War II issues of subversion and loyalty have been of great public concern. Although this is not the first time in American history when a preoccupation with the loyalty of citizens has necessitated an accommodation of the competing claims of national security and individual freedom, the recent history has raised most acutely the problem of federal-state relations in the area of subversion and loyalty. The resolution of these issues by the Supreme Court is the subject matter of this article.

A first aspect of the problem, the distribution between the states and the federal government of power to deal with matters of subversion and loyalty, has broad implications for our federal system of government. Consequently, the *Nelson* case,[1] which sharply limited the sphere of state action with respect to subversion, will be analyzed in detail as a case study in the operation and rationale of the Supreme Court's doctrine of federal supercession of state legislation.

The second aspect of the problem, the extent to which the exercise of power in this area by either the states or the federal government is consistent with constitutional guarantees of individual liberty, is part of the larger problem of satisfying the needs of national security while preserving individual freedom. With international tension likely to continue for the foreseeable future, a viable accommodation of freedom and security is a necessity. Because the primary concern here is with federalism, limitations on congressional power will be discussed only where necessary to illuminate the limitations which have been imposed on state power to deal with issues of subversion and loyalty.

If the states had been content to leave issues of subversion and loyalty to the federal government, these problems of federalism would not have plagued us to the same degree. Unfortunately, the states have not been content to do so.[2] Many state legislatures have embarked on ambitious programs of legislative investigation in order to uncover and expose disloyal or subversive persons and organizations. The use and abuse by investigating committees of their extensive powers, however, is only the prologue to the steady stream of legislation dealing with every phase of "subversion" which has poured from state capitols. Existing laws prohibiting treason, insurrection, sabotage, sedition and the like have been refurbished and expanded. Communists and subversives have been excluded from public office and denied the right to vote. Loyalty oaths have been widely required not only of elected officials and public employees but of other groups as well, particularly lawyers and teachers. Comprehensive registration statutes have required organizations or persons defined as "subversive" to register with state authorities. Disabilities are imposed on those who register, while a failure to register subjects the alleged "subversive" to criminal penalties. In some states the Communist Party has been made an unlawful organization; nearly everywhere substantial disabilities have been imposed on Communists. Among the various privileges and benefits which have been denied to "subversives" are jury service, public housing, tax exemptions and welfare benefits. And, finally, many municipalities have thought it necessary to duplicate the federal and state legislation with local ordinances covering the same ground.

It is difficult to escape the belief that much of this legislation has been both unnecessary and unwise. The danger of internal subversion has been magnified at times out of all proportion to the actual evil. Existing legislation, with minor exceptions, was capable of handling the problem, especially in its overt manifestations. Given the extensive federal legislation and enforcement, the need for action on the part of the states would have been satisfied by full cooperation with federal authorities.

If the state activity concerning loyalty and subversion is judged by its results rather than by its supposed necessity, the same conclusion is reached. A mere handful of admitted Communists have been prosecuted in state courts for sedition or similar crimes.[3] The Communist Party has been deprived of the somewhat dubious opportunity of capturing the vote of the common man. The registration schemes have been entirely inoperative: throughout the country only one individual is reported to have registered. Despite the lack of registrants, no prosecutions for failure to register have been brought. Only the loyalty oath requirements have proved to be of much consequence. Under their aegis, a substantial number of persons, including some Communists, have been removed from public employment (including such sensitive positions as subway conducting!) and from professions such

as teaching and law. This has been accomplished only at great cost in terms of the human losses resulting from dismissals and harassments and in terms of a climate of public opinion unfavorable to free expression of political views.[4] On balance, it seems likely that the excessive concern of the state governments with the loyalty of citizens has caused more damage to the free society, and produced far less in the way of results, than would have a quieter, more moderate approach.

But these expressions of opinion do not answer the constitutional issues. For better or for worse, the states have acted and the issue is their constitutional power to have done so. This is a matter on which personal views as to the wisdom of legislation have only a restricted relevance. The distribution of power in our federal system between the federal government and the states is the abiding verity; power cannot be redistributed merely because of a distaste for particular exercises of that power. Present-day limitations on state power to deal with issues of subversion and loyalty will be examined in this light.[5]

I. THE *NELSON* CASE—A CASE STUDY IN FEDERAL PREEMPTION

In *Pennsylvania* v. *Nelson*[6] the Supreme Court, drawing on the metaphorical tests for "occupation of the field" developed in commerce clause cases, held that federal legislation regulating communist activity had superseded the Pennsylvania Sedition Act. The decision, which invalidated similar statutes in forty-two states[7] and raised serious doubt as to the validity of other state measures in this field, has been much criticized, and there has been strong pressure for congressional reversal.[8] The merit of these proposals is beyond the scope of this paper, which will consider only (1) the propriety of the Supreme Court's application of preemption doctrine in the *Nelson* case,[9] and (2) the effect of the decision on state power with respect to subversive activities.

Nelson, an admitted member of the Communist Party, was convicted in a Pennsylvania state court for knowingly advocating the overthrow, by force or violence, of the governments of the United States and of Pennsylvania.[10] The Pennsylvania Supreme Court, finding that the case involved only sedition against the United States, reversed the conviction, holding that the Smith Act of 1940 had superseded the enforceability of the Pennsylvania Sedition Act.[11] The United States Supreme Court affirmed.[12]

The Court, in an opinion by Chief Justice Warren, held that the federal statutes dealing with national security, particularly the Smith Act of 1940,[13] the Internal Security Act of 1950[14] and the Communist Control Act of 1954,[15] "occupied the field" because each of several "tests of supercession" had been met: (1) "The scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."[16] (2) "[T]he federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject."[17] And (3) the "danger of conflict with the administration of the federal program" is "serious."

The scheme of federal regulation was thought "pervasive" because the Smith Act, the Internal Security Act of 1950 and the Communist Control Act of 1954 in the "aggregrate" made "inescapable" a conclusion that "Congress has intended to occupy the field of sedition."[19] The dominance of the federal interest was evidenced by the "all-embracing program for resistance to the various forms of totalitarian aggression" devised by Congress,[20] including the proscription of sedition against local and state governments as well as against the nation. The congressional findings that communist sedition was "part of a world conspiracy" indicated that sedition against the United States was a national, rather than a local, offense. The "serious" danger of conflict wth federal administration was based on statements of federal officials requesting local law enforcement officers to turn over to the F.B.I. all information relating to subversive activities; on the lack of uniformity and safeguards of the various state sedition laws; and on the peculiar feature of the Pennsylvania statute permitting actions to be brought on private information alone.

Finally, the Court indicated that the possibility of double punishment was a factor in its decision: "Without compelling indication to the contrary, we will not assume that Congress intended to permit the possibility of double punishment."[21]

Several novel aspects of the case merit attention. Nelson is apparently the first case in which the Supreme Court has held that a federal criminal statute, not involving a regulatory scheme under the commerce clause, supersedes, in the absence of conflicting provisions, the enforceability of a concurrent state criminal statute.[22] The application of tests developed in commerce clause cases to sedition legislation based on the federal war powers itself marks a significant extension of preemption doctrine. And finally, the Court's frequent use in recent years of preemption doctrine to effect broad displacements of state authority reopens the more important question of the soundness of preemption doctrine as it has been developed by the Court.

Ambiguity of the Tests Applied by the Court

The *Nelson* case builds on and exemplifies the de-

ficiencies of the Supreme Court's law of preemption.[23] The Court drew three "tests of supercession" from the available armory and undertook, with their guidance, to discover the intent of Congress. Although these tests —the dominance of the federal interest, the pervasiveness of the federal scheme, and the possible conflict in administration—represent relevant considerations, their content here as elsewhere is undefined, and their application fails to provide a confident answer to the question to which they were supposedly directed—the intent of Congress.

1. *Dominance of the Federal Interest.* The Court's assertion that communist sedition is a matter of paramount interest to the federal government must be readily accepted. The Constitution empowers Congress to "provide for the common Defense and general Welfare of the United States,"[24] provides war powers of sweeping nature,[25] and charges the federal government with the duty of "guarantee[ing] to every State in this Union a Republician Form of Government."[26] Whatever may have been the localized impact of street-corner anarchist speeches, the modern problem of subversion by a tightly-organized conspiracy is a national problem calling for a national solution. But to concede this is not to solve the preemption problem.

The Court assumed that whenever Congress legislates in a field in which the federal interest is dominant, it intends to preclude enforcement of state laws on the same subject. If congressional intent is really to be controlling, the assumption seems fallacious. Why should it be assumed that state legislation embodying the same purpose and prohibiting the same activity is thereby invalidated? Is it not as reasonable to assume that Congress contemplated the cooperation of the states against the common enemy?[27] Either assumption—that of preclusion or that of cooperation—appears equally reasonable (or equally unreasonable!) in the absence of any other evidence of congressional intent. And what little evidence there is supports an inference of cooperation rather than preclusion: Congress was aware of the widespread existence of state legislation prohibiting sedition; its own statute was largely copied from one of the older state statutes; and Congress did nothing expressly to preclude the continued operation of these state statutes.

Moreover, it is not enough to say that the federal interest is dominant. The interest of the states in self-preservation and in preservation of the Union must also be considered. State legislation based on these interests, proscribing treason, sedition, espionage and similar offenses, is old. Overlapping federal legislation on these matters has existed at various times and contentions that the federal legislation preempted the field have been rejected whenever made.[28]

Gilbert v. *Minnesota*[29] was the leading case. Gilbert had been prosecuted and convicted in a state court for interfering with military enlistment during World War I, conduct which was also proscribed by the Federal Espionage Act.[30] The Court, in affirming the conviction, emphasized the cooperative nature of the federal system and the interest of the states in assisting the federal government in preserving the whole. The Court's opinion went on to say that the state statute was justified as a local police power measure designed to prevent breaches of the peace. In the *Nelson* case, *Gilbert* was treated as resting solely on the narrower police power ground.[31] Limiting *Gilbert* to its narrowest holding, clearly not the intended one,[32] reduces the case to insignificance.

Instead, the Court in *Nelson* relied on *Hines* v. *Davidowitz*,[33] in which the Federal Alien Registration Act of 1940[34] was held to supersede a Pennsylvania alien registration statute. The common feature of the two cases is that both involve matters of vital federal interest. But there the resemblance ceases. The state regulation involved in the *Davidowitz* case required aliens to carry an identification card at all times, a burdensome feature which Congress had rejected. Moreover, the Court felt that the existence of dual regulation would have repercussions on United States foreign policy, a matter within the exclusive power of the federal government. Finally, overlapping regulation was involved in the *Davidowitz* case, rather than concurrent criminal statutes as in the *Nelson* case, and as will be seen, this factor is of some significance.

2. *Pervasiveness of the Federal Scheme.* It is true that the Smith Act, the Internal Security Act of 1950, and the Communist Control Act of 1954 add up to a tidy bit of legislation. But does it follow from the fact that Congress enacted three major communist control measures in the space of fifteen years that Congress "intended to occupy the field of sedition?"

It should be noted first that only one of these statutes deals with sedition. The Smith Act,[35] the only federal statute dealing directly with sedition, is a criminal statute pure and simple, prohibiting certain defined conduct. It proscribes among other things the advocacy of the overthrow of federal or state governments by force or violence. The Internal Security Act of 1950 and the Communist Control Act of 1954 have more of a regulatory character. The former requires the registration of "Communist-action organizations" and "Communist-front organizations";[36] the latter declares "that the Communist Party . . . is in fact an instrumentality of a conspiracy to overthrow the Government of the United States"[37] and that it is a "Communist-action" organization within the meaning of the Internal Security Act of 1950, and provides that

"knowing" members of the Communist Party are "subject to all the provisions and penalties" of that act.[38]

Moreover, it is not true that the broad treatment by Congress of any subject within its power automatically bars supplemental action by the states dealing with the same subject matter. *California* v. *Zook*[39] serves as an extreme illustration in an area complicated by the negative implications of the commerce clause. A regulation of the Interstate Commerce Commission pursuant to the Motor Carrier Act of 1955 prohibited the sale of "share expense" automobile passenger transportation in interstate commerce where the transporting carrier had no permit from the ICC. Despite the broad regulatory character of the federal legislation, the Court affirmed a conviction under a California statute prohibiting conduct identical to that prescribed by the federal act.

An example drawn from another area of federal action may clarify the point. A complicated set of federal statutes, filling 220 pages of the United States Code, deals with banks and banking.[40] These include comprehensive legislation covering the organization and regulation of national banks, the Federal Reserve System, and the Federal Deposit Insurance Corporation, to name only a few. A related provision of the criminal code proscribes bank robbery and related crimes involving banks organized, operating, or insured under the laws of the United States.[41] Does the existence of this comprehensive federal legislation mean that states are without power to punish robberies from such banks which occur within their jurisdiction? The answer has always been thought to be otherwise.[42]

The existence of concurrent state and federal criminal statutes dealing with sedition can with equal logic support either the inference that Congress intended to supplement state law or that it intended to replace state law. To label other federal legislation dealing with national security as a "pervasive scheme of regulation" does not advance this logic, but states a conclusion which must have been reached on other grounds.

3. *Possible Conflict of Administration.* A clear-cut showing that state sedition prosecutions had interfered with the administration of the Smith Act might have redeemed the deficiencies of "dominance" and "pervasiveness." Unfortunately, despite the considerable period of concurrent legislation, the Court was unable to adduce any evidence of actual conflict in administration. It relied instead on the possible danger of administrative conflict in the future which might result from dual legislation and lack of uniformity in the provisions of the state statutes.

Statements made during 1939 and 1940 by President Roosevelt and J. Edgar Hoover requesting the states to turn over any information with respect to subversive activities to the federal government were quoted as supporting a danger of conflict. As Mr. Justice Reed pointed out in the dissent, these statements contained "no suggestion from any official source that state officials should be less alert to ferret out or punish subversives."[43] The views of the Department of Justice, appearing at the invitation of the Court to state the position of the United States, to the effect that the state legislation had not impeded federal enforcement would appear to be entitled to at least as much weight.

Inapplicability of Commerce Clause Tests

Enough has been said to indicate that the Court treated the *Nelson* case as though it were a case such as *Hines* v. *Davidowitz*,[44] in which a state exacted additional requirements on a matter regulated by Congress. The tests applied in *Nelson* were largely drawn from commerce clause cases involving a deviation of state law from the federal pattern, rather than a mere coincidence of state and federal law.[45] The case would more properly have been treated as one of coincidence of state and federal criminal statutes.

The common feature of the Smith Act of 1940, the Internal Security Act of 1950 and the Communist Control Act of 1954 is that each is concerned with national security. But, as pointed out above, the Smith Act is the only federal criminal statute dealing directly with sedition. Although the Internal Security Act contained new criminal provisions proscribing conspiracy to establish a totalitarian dictatorship and communication or receipt of classified information,[46] its major concern is the elaborate registration scheme for communist organizations.[47] The criminal penalties for failure to register are incidental to the regulatory scheme.[48] The Communist Control Act expanded the registration scheme to include "Communist-infiltrated" organizations and extended the requirements of the Internal Security Act to knowing members of the Communist Party.[49]

Although these statutes are interrelated, only the registration and related provisions of the Internal Security Act and the Communist Control Act would seem to constitute a comprehensive regulatory scheme of the type that has been thought to require a preemptive intent. The question in the *Nelson* case was not whether state statutes requiring registration of communist organizations and members had been superseded, but only whether state sedition prosecutions were precluded.[50] The case before the Court involved only the coincidence of state and federal criminal legislation, not differing state and federal regulatory schemes.

The Pennsylvania Sedition Act and the Smith Act,

by very similar language, attempt to reach the same objectives—the punishment of advocacy of the violent overthrow of established government. They are criminal statutes proscribing specified conduct and creating substantive crimes independently of any administrative or statutory regulation. In this respect they are like statutes punishing murder, robbery, or kidnapping, which are crimes against both state and nation whenever elements giving rise to both federal and state jurisdiction are present.[51] Although the federal government may have a more vital interest in punishing sedition, particularly when a worldwide conspiracy is involved, the states also have a legitimate interest not only in self-preservation but also in the preservation of the Union.[52] Once it is assumed, as the Court did, that the states have concurrent power with the federal government to punish sedition against the federal government, it is difficult to see why cooperative federalism is a one-way street. Why is it the federal government through its criminal statutes may aid the states in the preservation of public order—a primary responsibility of the states in our tradition—but the states may not endeavor to assist the federal government in the achievement of primarily federal objectives such as the preservation of the Union? In the absence of any compelling evidence of congressional intent or of a conflict of statutory provisions, federal unity would be subserved by allowing cooperative state action. Thus a preemptive intent should not have been inferred in the *Nelson* case absent a showing of conflict.

Importance of Other Factors

The Court's opinion itself suggests that the real problem of the case—whether state sedition prosecutions should be permitted once Congress had actively entered the field—was decided on more pragmatic grounds than are comprehended in the hazy aphorisms of preemption. The opinion manifests a strong distaste for the state statutes in this field: many "are vague and are almost wholly without . . . safeguards."[53] The Pennsylvania statute in particular is severely criticized: one of its provisions is "strangely reminiscent of the Sedition Act of 1798"[54] and the fact that a prosecution may be initiated by a private individual "presents a peculiar danger of interference with the federal program" and provides an opportunity "'for the indulgence of personal spite and hatred or for furthering some selfish advantage or ambition.'"[55] Finally, and most importantly, the Court gives great weight to the possibility of double punishment.[56]

The magnitude of the threat to civil liberty presented by overlapping state and federal criminal statutes should not be minimized. The possibility that an individual may be subjected to successive state and federal prosecution for what would otherwise be regarded as a single crime raises serious questions of policy if not of constitutional law. Exposing an individual to a second trial when the first has resulted in an acquittal by a jury contravenes an honored tradition of Anglo-American society. Likewise, punishing an individual twice for the same act violates "the principles of the common law, and the genius of our free government."[57] Concurrent criminal statutes may be the cause of other dilemmas. The privilege against self-incrimination may be deprived of substance if a witness in a proceeding in one jurisdiction is compelled to answer questions which incriminate him under the laws of another jurisdiction. The right to be secure against unreasonable searches and seizures may be abased if evidence illegally obtained by state officers is utilized in a federal trial.

Despite the impairment of civil liberty, the Supreme Court has held that a second prosecution or punishment by a different government for the same act does not violate the Due Process Clause[58] or the constitutional provision against double jeopardy.[59] Similarly, it has been held that the constitutional privileges protecting against self-incrimination and illegal searches and seizures do not prevent the use in a federal proceeding of incriminating evidence obtained by testimonial compulsion from a witness in a state proceeding[60] or obtained illegally from him by state officials.[61]

The possibilities of double punishment and attendant difficulties created by overlapping state and federal criminal laws are considerations which a legislature should bear in mind in deciding whether dual legislation is desirable. But are they factors which should influence the decision of preemption cases? The history and development of federal criminal legislation suggests that ordinarily such factors should not influence the decision of preemption questions.

The early denial of a federal common-law criminal jurisdiction[62] placed the primary responsibility for the maintenance of public order on the states. Prior to the Civil War the criminal legislation enacted by Congress was confined entirely to matters of distinctive federal concern: offenses not subject to state jurisdiction (District of Columbia, territories, high seas)[63] and offenses directly threatening the existence, integrity or property of the federal government and its institutions (treason, contempt of court, resistance or obstruction to federal process, bribery of federal officers, theft of federal property, defrauding of the revenue and the like).[64] The protection of private individuals from harms committed by other private individuals, and the use of criminal sanctions to deter and punish such harms, became a traditional responsibility of the states.

When the federal government entered the same field in a major way in the twentieth century,[65] it did so primarily to aid the states in enforcing their criminal laws. In some instances (mail fraud, lottery by mail), the use of federal instrumentalities was involved, but the connection would appear to be a jurisdictional handle rather than a real connection with any distinctive interest of the federal government. In some instances (e.g., mail fraud), the lack of any local incentive to prosecute for harms which have their primary impact elsewhere was involved. But the major factors have been either a congressional desire to enlist the powerful forces of the nation to preserve public morality (lottery, white slave, narcotics) or a desire to aid state enforcement in situations where it might be frustrated by the inability of state law enforcement officers of limited territorial authority to cope with the interstate movement of criminals or stolen property (motor vehicle theft, kidnapping, stolen property).[66]

The circumstances of enactment, if not express provision, made it clear in most of these instances that the Congress did not intend to displace state criminal action in these fields. Even when matters of distinctive federal concern, such as the protection of federal property, were involved, the natural inference was that Congress intended to supplement state laws and not to displace them.[67] The state interest in preventing breaches of the peace is involved to the same extent no matter whose property is taken. State law enforcement officers have provided protection to federal property from the earliest days of the government. It is in the interest of the federal government to have them active in the protection of federal property, for otherwise a more extensive national law enforcement staff would be required. Possible conflicts in the administration of these dual criminal laws and the general undesirability of possible double prosecution or double punishment cannot outweigh the manifest intention of Congress to *supplement* existing state criminal legislation. Thus the historical development of federal criminal legislation and its interstitial character have been thought to preclude a finding that Congress intended to "occupy the field."[68]

Other factors have contributed to this conclusion. In many instances Congress has by specific language dealt with the problem, either saving state jurisdiction by express provision[69] or preventing dual prosecution.[70] And the inference of preemptive intent that might otherwise be drawn from the fear of dual prosecutions is considerably diluted by the fact that, in practice, such prosecutions are extremely rare.[71]

The *Nelson* case is not the first case in which the Court has been influenced in its decision of preemption questions by fear that the existence of overlapping state and federal criminal legislation would result in deprivation of civil liberties.[72] Nor can it be said that under present Supreme Court preemption doctrine, which requires the Court to make a search for congressional intent that is almost invariably illusory, this is an irrelevant consideration. But it is questionable whether a court should undertake such a task. Attempting to ascertain the intention of Congress on the basis of an assessment of possible deprivations of civil liberties, which have not occurred and may not occur, involves the weighing of legislative considerations and the dangers of advisory opinions. Might it not be better to adjudicate any constitutional questions as they arise?

The Supreme Court appears about to do this with respect to double prosecution or punishment by a different government for the same act. There have been intimations in recent years that the Court was unhappy with the doctrine of the *Lanza* case[73] and might be willing to overrule it or distinguish it as involving a special Eighteenth Amendment problem. The Court has recently heard argument in two cases reopening the issue which *Lanza* had appeared to settle: whether a second prosecution or punishment by a different government for the same act violates the due process clause or the constitutional provision against double jeopardy. In *Bartkus* v. *Illinois*,[74] the petitioner was convicted of bank robbery in a state court after an acquittal in a federal court of robbery of the same bank. The elements of the state and federal offenses, and the interests protected, were the same, aside from the jurisdictional allegation in the federal case that the bank's funds were federally insured. In *Abbate* v. *United States*,[75] the other pending case, a federal conviction for conspiracy to destroy communication facilities operated or controlled by the United States followed a state conviction for conspiracy to injure private property. In this case, unlike *Bartkus*, the interests sought to be protected by the federal and state laws do not appear to be the same, and it is arguable that the elements of the two offenses are different.[76] In any event, the Court now has before it the constitutional problems which, one surmises, had an important influence on the *Nelson* decision. It does not seem unlikely that the *Lanza* rule will be overturned and that the states will be forbidden to prosecute a person acquitted of the same act after a federal trial. If this occurs, the justification for deciding in favor of preemption in the *Nelson* case disappears to the extent that the decision was based on a desire to prevent dual prosecution and punishment.

The Saving Clause

In a footnote to its opinion[77] the Court disposed of an argument, accepted by the dissent, that the saving

clause of the criminal code demonstrated a congressional intent not to supersede state criminal statutes. This saving clause presently appears as the second sentence of Section 3231 of the criminal code, which in its entirety reads as follows:

> The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.
>
> Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.[78]

The Court said that the saving clause was intended "merely" to limit the effect of the jurisdictional grant of the first sentence of Section 3231, and was not intended "to resolve particular supercession questions."[79] This construction of the saving clause does violence to the plain meaning of the words used and is contrary to its long-established interpretation.

The first sentence of Section 3231, by vesting exclusive jurisdiction of "all offenses against the laws of the United States," operates to preclude the states from enforcing *federal* criminal laws.[80] Standing alone, it might also have been susceptible of the interpretation that state power to punish for any act constituting an offense against the laws of the United States had been superseded. The Court, in the *Nelson* case, is apparently saying that the only function of the saving clause is to negative this possible inference. The language, however, is much broader: "Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof." Taken literally, the saving clause means that the states retain their original powers to define and punish criminal conduct occurring within their respective jurisdictions, *notwithstanding the fact that the same conduct is punishable as an offense against the United States.*

Of course, a general provision of the criminal code, such as the saving clause, cannot prevent Congress from subsequently enacting legislation which is intended to supersede state legislation. The specific enactment would control rather than the more general. But a general provision may create a policy of nonpreemption which is overborne only by an actual conflict of provisions or a clear expression of congressional intent to the contrary.

The history of the two sentences of Section 3231 is instructive. The first sentence of Section 3231, vesting exclusive jurisdiction of federal crimes in the federal courts, may be traced back to Section 11 of the Judiciary Act of 1789,[81] which declared that the Circuit Courts of the United States shall have "exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where this act otherwise provides or the law of the United States shall otherwise direct." Most of the early federal criminal statutes, by language almost identical to the present saving clause, did "otherwise direct." Federal statutes of 1806 and 1807 prohibiting counterfeiting and uttering of "current coin" of the United States were the first to do so:

> . . . nothing in this act contained shall be construed to deprive the courts of the individual states of jurisdiction under the laws of the several states, over offenses made punishable by this act.[82]

A similar provision was contained in the Federal Crimes Act of 1825,[83] the first comprehensive federal criminal legislation. With slight changes in phraseology, the saving clause was incorporated in the Revised Statutes of 1878 and made applicable to the entire criminal code.[84] Since 1909 it has been applicable to what is now Title 18 of the United States Code —the criminal code.[85]

Until the 1948 revision of the criminal code, the first sentence of present Section 3231, vesting exclusive jurisdiction of federal crimes in the federal courts, and the second sentence, saving to the states jurisdiction "under the laws thereof," were separate sections.[86] The reviser, as part of the revision of Title 18, combined them to form present Section 3231. The change, of course, was not intended to make any change in substance.[87]

The Supreme Court definitively construed the saving clause in *Sexton* v. *California*.[88] Sexton was convicted in a California state court of extorting money from another by threatening to accuse him of violating the internal revenue laws of the United States. The identical conduct was prohibited by a federal criminal provision. The Court, emphasizing the fact that the federal statute was within the scope of the saving clause, unanimously held that the conduct was "an offence both against the State and the United States, punishable in each jurisdiction under its laws."[89] The saving clause was said to "take the case out of the" exclusive jurisdiction of the criminal code, and its function described as follows:

> "The [saving clause] was not intended to merely permit a state court to punish a different offence involved in the one act. It was intended to leave with the state court, unimpaired, the same jurisdiction over the act that it would have had if Congress had not passed an act on the subject."[90]

The Smith Act is one of the criminal provisions of the criminal code and is subject to the general provisions of Section 3231.[91] The Supreme Court should have held that the saving clause operates to preserve, after the enactment of the Smith Act, the preexisting power of the states to legislate with respect to sedi-

tion. Mr. Justice Reed would appear to be correct in stating that "this one point seems in of itself decisive."[92]

Effect of the Decision

The *Nelson* case holds that the states cannot punish for sedition directed against the United States government, but declares that they remain free to punish for offenses involving a local breach of the peace. Except at these extremes, the scope and effect of the decision are unclear. Only the passage of time will clarify intermediate situations, such as the effect of the decision on state criminal prosecutions for other overlapping offenses, on state communist control measures, on state loyalty oath programs, and on state legislative investigations. Foolish as it may be, some guesses with respect to each of these will be hazarded.

1. *State Criminal Prosecutions.* Two state court decisions subsequent to the *Nelson* case have reached the conclusion that a state can no longer punish sedition directed against the state when the evidence also establishes an attempt to overthrow the federal government.[93] The conclusion reached would appear to be correct. Although the seditious conduct in the *Nelson* case was said to be directed solely against the federal government, the reasoning of the Court is equally applicable to any case in which communist sedition is involved. The Smith Act prohibits attempts to overthrow state or local governments as well as the federal government.[94] The nature of the communist movement, when considered in connection with the congressional declaration that the Communist Party is engaged in a worldwide conspiracy to overthrow established government,[95] makes it unlikely that any case involving communist sedition would not present an attack against federal as well as against state authority. State activity in this area would appear to require evidence of an actual or threatened local breach of the peace. If, for example, a seditious speech resulted in a serious public disturbance, the state could impose punishment. The *Nelson* case does not "limit the right of the State to protect itself at any time against sabotage or attemped violence of all kinds."[96] And the decisive issue should be whether there is evidence of a threat to a distinctive local interest, such as maintenance of public order, and not the label affixed to the indictment.

Outside of the sedition area, the *Nelson* case suggests a distinction that may prove to have a considerable effect on state power to punish for overlapping federal-state offenses: State power to punish conduct which also constitutes a federal offense exists if the conduct threatens or produces a local breach of the peace. A similar distinction was suggested under somewhat false colors in the famous case of *Fox* v. *Ohio*.[97] Fox had been convicted in a state court for uttering false coin, and the Court, in sustaining his conviction, stated that counterfeiting and uttering of spurious coin were distinct and independent crimes. Counterfeiting affected a distinctive interest of the federal government—its monopoly over the coinage of money—, whereas utterance of spurious money affected a distinctive local interest—the protection of the local citizenry from fraud. This distinction might have made some sense if the utterance of base coin had not also been prohibited by a federal statute. The Court's deliberate ignoring of this crucial fact, relied on by appellant and stressed by a dissenting judge, merely raised doubts as to the constitutionality of the federal statute prohibiting utterance. Three years later, by a unanimous decision in *Ex parte Marigold*,[98] the federal statute was upheld and the doubt settled. Ever since it has been established doctrine that both the states and the federal government can punish the utterance as well as counterfeiting of spurious money.[99]

The likely effect of the *Nelson* decision is not to prevent all state prosecutions for an offense also punishable under federal law, but only to require that some aspect of local police power be involved. Both state and federal governments can continue to punish such overlapping offenses as bank robbery,[100] assault on a federal officer,[101] theft from a post office[102] and the like,[103] since in each case the criminal conduct inevitably involves a local breach of the peace.

It is probable, however, that state power to punish other overlapping offenses, such as interference with federal recruitment, desecration of the United States flag, impersonation of a federal officer and the like, is no longer permissible absent a showing that a local breach of the peace was involved. In each of the above instances the state law is auxiliary to federal law enforcement. The states are seeking to aid the federal government in maintaining respect for federal institutions. Although there is no logical reason why the police power of a state should not encompass the furthering of national purposes and unity, these matters are of distinctive federal interest, and the existence of a federal penalty may be thought to require a finding of preemption.

People v. *Von Rosen*,[104] a recent Illinois case, is the first case after *Nelson* to apply these principles. The defendants, who had published a picture of a young woman innocent of any clothing other than a large hat, sunglasses, and a small and appropriately placed piece of cloth resembling the United States flag, were convicted in a state court for public desecration of the United States flag, conduct also prohibited by a federal statute. The Illinois Supreme Court, in replying to the argument that the federal

statute had "occupied the field," concluded: "While it might be inferred that Congress has left no room for the States to punish desecration *qua desecration,* it cannot be inferred that Congress intended to prevent the States from prohibiting that which incites or tends to incite a breach of peace."[105] The court therefore interpreted the state statute as limited to situations where the conduct was likely to produce a breach of peace within the state. Since there was no evidence in the record tending to show likelihood of a breach of the peace, the court reversed the conviction—" . . . the Illinois act cannot be constitutionally applied to these defendants."[106]

2. *State Communist Control Measures.* A number of states have comprehensive communist control measures resembling the federal Subversive Activities Control Act of 1950 and Communist Control Act of 1954.[107] These statutes provide for registration of communist and subversive organizations, set out penalties for sabotage, and impose various disabilities upon registrants, such as exclusion from the ballot and public office. Other states require registration but do not impose disabilities upon registrants.[108] Many states have statutes resembling the federal Foreign Agents Registration Act of 1938[109] and the Voorhis Act of 1940,[110] requiring registration of foreign agents and propagandists, or statutes requiring the registration of aliens during wartime or other periods of emergency.[111]

It is probable that most of the provisions of these statutes have been superseded by federal legislation. The statutes dealing with aliens and foreign agents would appear to have been invalidated by *Hines* v. *Davidowitz.*[112] In any event, there has been no attempt to enforce the provisions of these state statutes.

The registration statutes duplicate and enlarge the federal registration scheme. Nearly all of them differ from the federal scheme in one or more respects. Some are accompanied by provisions outlawing the Communist Party. Because of the probable conflict of provisions, there is a much clearer case for preemption with reference to these statutes than there is with respect to the sedition statutes invalidated by the *Nelson* case. Moreover, the breadth and thoroughness of the federal scheme plus the square precedent provided by the *Davidowitz* case, make it much easier to infer a preemptive intent on the part of Congress.[113] It is not surprising that the Michigan Supreme Court, in *Albertson* v. *Millard,*[114] held that Michigan's comprehensive communist control law had been superseded by the similar provisions of federal communist control measures.

3. *Civil Disqualifications.* Existing state statutes impose a variety of civil disqualifications on subversives: exclusion from the elective process; loyalty oaths as a qualification for public office, public employment, teaching positions, admission to the bar, and so on; and denial of various privileges and benefits (voting, jury service, tax and welfare benefits, etc.).[115] It seems probable that most of these provisions are unaffected by the *Nelson* case and remain enforceable. The only authority thus far, a decision of the Florida Supreme Court upholding the loyalty oath required of Florida's state employees,[116] supports this conclusion.

Qualifications imposed by the states on office holding and public employment present the easiest case. The states have a vital interest in controlling eligibility for public office and public employment. No federal statutes deal directly with these matters and federal power to do so is subject to question.[117]

Serious problems are raised, however, by various state laws denying the use of election facilities, and other rights and privileges, to the Communist Party and other subversive organizations. These restrictions are in accord with federal policy—the Communist Control Act of 1954 declares that these organizations are not entitled to any rights, privileges, or immunities heretofore granted by the United States or any political subdivision thereof.[118] The state statutes may effect a greater or lesser deprivation, or there may be an exact coincidence. In either case it is arguable, though perhaps improbable, that the state provisions have been superseded by the blanket federal termination of "rights, privileges, and immunities," at least in elections for federal offices.

4. *State Legislative Investigations. Sweezy* v. *New Hampshire,*[119] considered hereafter, bears more directly on the power of state legislatures to investigate subversive activities. However, the *Nelson* case would appear to have a restrictive effect of indeterminate proportions in this area. Legislative inquiries which affect individual liberties are permitted only when a public need to obtain information on which to base legislation concerning a recognized public evil justifies the intrusion. If the states lack effective power to enforce legislation with respect to a particular matter, such as sedition, it would seem that the power to conduct legislative inquiries leading toward such legislation would be reduced in scope. Of course, so long as states are free to impose a wide range of civil disqualifications on alleged subversives, a wide-ranging legislative inquiry into subversive activities within the state could be based on the need to ascertain the factual basis for such legislation.[120]

The Preemption Doctrine—An Evaluation

The analysis of the *Nelson* case in this article suggests that the Court erred (1) in failing to examine

critically the applicability of the "tests of supercession" drawn from commerce clause cases, and (2) in failing to reckon in serious fashion with the saving clause of 18 U.S.C. §3231. The discussion thus far has proceeded entirely on the assumption that the states have concurrent power with the federal government to prescribe criminal penalties for sedition directed against the United States. This assumption has been made only because the Supreme Court decided the case on that basis. It is possible, however, that the assumption is unwarranted and that the case reaches the right result, although for the wrong reasons.

The federal war powers are broad and inclusive. May it also be added that they are exclusive? Surely some of them, such as the declaration of war, the maintenance of armed forces and the conduct of war, are responsibilities of the federal government alone.[121] And although the states retain the power of self-preservation to suppress insurrection and repel invasion, the duty of preserving the state governments rests upon the federal government. Do the states have any role to play when a seditious attack upon the federal government is made? It would seem that just as the states may not punish treason against the United States,[122] so also the power to punish sedition directed against the United States is beyond their province.[123] This, at least, is an arguable position, which finds some support in history and which results in a tenable distinction between federal and state spheres of action: State action involving a matter within the exclusive competence of the federal government, such as national defense and foreign relations, is justified only if conduct constituting a local breach of the peace has occurred. This view justifies the result, if not the rationale, in *Nelson* and in *Hines* v. *Davidowitz*.

The *Nelson* case, however, has not been given this lengthy treatment merely to demonstrate that its result is right or wrong. The analysis of the case has significant implications for preemption doctrine generally. These more general conclusions will now be explored.

Cases presenting preemption problems may be divided into three general classes, each of which has been accorded somewhat different treatment because of the differing policy considerations that are applicable. First, in a few cases federal and state statutes have been found in *conflict* in the sense that compliance with one necessarily constitutes violation of the other. *Southern Ry. Co.* v. *Reid*[124] is one of the infrequent cases of this kind. A North Carolina statute which subjected rail carriers to penalties for failure to transport freight to interstate points as soon as received was held to conflict with a federal statute forbidding such transportation until rates had been fixed and published. While it may be difficult to determine whether a conflict actually exists, once one is found the supremacy clause of Article VI controls the result. The state statute must give way.

A second class of cases, involving situations where a state pattern of regulation *deviates* from the federal pattern without directly conflicting with it, is more difficult of solution. The state regulation may differ in that it imposes an additional requirement on the same matter,[125] or in that it closes a gap in the federal scheme by regulating a closely related matter.[126] In either case a similar problem arises: Did Congress intend that its regulation should stand alone? In the usual case congressional intent is unclear, and conflicting inferences may be drawn from the fact that the regulatory patterns differ from one another. On the one hand it is possible that congressional failure to embody the deviating provisions of the state regulation in the federal regulation indicates congressional rejection of those provisions. This negative inference may be nourished by judicial speculation concerning possible "inconsistency" of the state regulation with the policy, purpose or administration of the federal statute. On the other hand, the very difference of the federal and state statutory schemes gives rise to the inference that the state statute serves a state interest independent from the federal interest safeguarded by the federal enactment. In a federal system the interests of both governments should be given recognition if it is possible to do so. This approach results in the validation of dual regulation.

Although various predictive factors exist, such as the historic pattern of state or federal regulation of particular matters, the Court has been extremely inconsistent in dealing with cases of this second type. The hollow repetition of catchwords such as "pervasiveness," "dominance," and the like, has merely obscured the Court's *ad hoc* fluctuation from the negative inference that deviation is an inconsistency to the inference that it expresses an independent state interest. In truth, both factors are almost invariably present. Any difference makes a difference (even if it be only the narrow one that the regulated party has two slightly different regulatory schemes to reckon with rather than a uniform scheme); and the state statute, to the extent that it differs from the federal, always expresses a peculiar concern of the state.

The third class of cases involves situations where federal and state statutes *coincide* by requiring or forbidding exactly or substantially the same thing. Cases of this type, like deviation cases, are frequent, but unlike deviation cases a large number of them involve criminal sanctions. Federal and state penalties dealing with share-expense automobile transporta-

tion,[127] transportation of diseased cattle,[128] and robbery of national banks[129] illustrate the variety of cases of this kind. Whatever the subject matter, however, the significant characteristic is that the same purpose underlies the respective action of the state and the federal government. This characteristic makes coincidence cases easier, and at the same time more difficult, of solution than deviation cases. Because the state legislation serves no independent purpose of its own it appears to lack justification, and there is a tendency to infer a preemptive intent.[130] On the other hand, given the realities of cooperative federalism in regulation and law enforcement, there is a natural inference that each jurisdiction may simultaneously protect its own interest and reinforce the interest of its governmental partner.[131]

These different views may be based on different conceptual theories concerning the nature of our federal system. If the state and federal governments are viewed as jealous sovereignties contending for power, with the Court in the position of an arbiter, the burden of overlapping regulation and the resulting possibilities of friction are likely to be magnified. The result is an inclination to infer a preemptive intent. Particularly is this so if the states have entered a field which is thought to be one of "predominant" federal interest. On the other hand, if one views the federal system as a cooperative whole, the fact that Congress, by enforcing the same regulation or proscribing the same conduct, has thought it wise to aid the states, or the states to aid Congress, is unlikely to induce the inference that Congress intended to displace the state legislation. It is only fitting that as partners in the same enterprise they should seek to assist one another toward their common objectives. Overlapping criminal statutes have long been viewed in this fashion.[132]

It is obvious from even a moment's reflection that both of these conceptual patterns contains elements of truth. A degree of competition and strife between the governments of a federal system is inevitable. Yet the entity could not long survive unless it also brought forth a high degree of cooperation. The inconsistent resolution of coincidence questions suggests that the court has not adopted either one of these generalized views but proceeds in a more particularistic fashion. Insofar as congressional intent is unclear (the thesis here is that that is the normal case) and precedent does not control the result (as it does with much overlapping criminal legislation), decision seems to turn on a case-by-case determination of whether the duplication of legislation is wise. If the burden placed on persons subject to the dual regulation or exposed to dual punishment is not outweighed by the positive value the Court sees in legislative duplication, such as more effective enforcement, the state statute is likely to be struck down. It should go without saying that subjective considerations with respect to the desirability of particular kinds of economic regulation or criminal penalties cannot help but participate in this balancing process.

The most significant problem raised by preemption cases is the role which should be played by the Supreme Court. The thesis of this article is that in the *Nelson* case, as in most preemption cases, congressional intent is not only unclear but unfathomable, and that the "tests of supercession" which the Court purports to apply do not provide an answer to the question to which they are supposedly directed—the intent of Congress. The conclusion which is drawn is that judicial notions concerning the desirability in particular cases of overlapping regulatory schemes or overlapping criminal sanctions are more significant in determining the results. Should the Supreme Court exercise this type of policy judgment?

It is worth noting that the alternatives of the Court are extremely limited—if there is no objective method of determining congressional intent and if the Court eschews the broader policy judgment of the desirability of the overlapping legislation, the only alternative is the automatic application of a conclusive presumption for or against a preemptive intent on the part of Congress. The Court apparently has felt that the exercise of a broader judgment is the wiser course. No doubt it has been influenced by the reluctance and inability of Congress to provide legislative solutions. The close balance of contending groups in the Congress may operate to foreclose any immediate legislation or to force a compromise which leaves the displacement of state law deliberately vague. Congressional performance in the field of labor relations may be of this character.[133] Perhaps it is not unfair for the Court to interpret congressional silence as an invitation for the Court to provide answers as problems arise. In other areas, lack of interest in the subject matter or lack of awareness of the complexity of the problems may explain the failure of Congress to lay down adequate guides. Even in these situations the Court may be justified in making the policy judgments which Congress has failed to make. And, this writer feels, as a policy matter the Court for the most part has exercised its judgment in preemption cases in a wise fashion.

Despite the appeal of the Court's record, it is believed that the exercise of such functions by the Court is inappropriate. A democratic society should not commit such important matters to the relatively unencumbered judgment of non-elected officers. Moreover, the application of a presumption would have the virtue of forcing legislative concern with prob-

lems which no legislature should be permitted to avoid. If a presumption were to be applied, it seems clear that it should be a presumption that Congress did not intend to supersede overlapping state legislation. In a federal system the interests of both the states and the federal government should be given recognition until they come into collision with one another. The states cannot remain as independent centers of governmental power if the expression of state policies is foreclosed merely by the enactment of federal legislation dealing with the same or a closely related subject-matter. A presumption in favor of preemption is destructive of state power. The opposing presumption permits the state to continue as viable units while leaving Congress free to protect the federal interest when it is threatened by state legislation.

Conclusion

The question of federal supercession of state legislation only arises when Congress, exercising a power not within the exclusive competence of the federal government, has dealt in a constitutional fashion with the same conduct or legal relations which is the concern of the otherwise valid state legislation brought into question. Under traditional doctrine, the question is phrased in terms of whether, under the supremacy clause of Article VI, existing federal legislation has "occupied the field" to the exclusion of concurrent state legislation. The answer is said to turn on the intent of Congress. Since in any case likely to reach a court Congress has remained silent with respect to the displacement of state law, the courts are left to solve the problem with few if any guides. Ultimately, the Supreme Court must supply or presume an intent from whatever available materials it deems proper.

The purposes, scope and content of concurrent state and federal legislation are of such vast variety, and situations of concurrence so large in number, that a simple solution to preemption problems should not be expected. No abstract formula can resolve complicated problems of federalism. Nevertheless, the confusion of the cases, even bearing in mind that no two preemption cases present the same problem, is striking. Various "tests" of supercession are stated in the cases, singly or in combination,[134] and the choice of a particular test or tests may be more decisive than its application. On some occasions only one test is viewed as controlling and others are ignored;[135] in other cases several are examined.[136] Nor is the content of any test much clearer. What is "conflict" in one case is characterized as "coincidence" in another; a "field" that is narrow here is broad there; and so on. Today as well as thirty-five years ago, it seems true that "The Court has drawn its lines where it has drawn them because it has thought it wise to draw them there."[137] It is no wonder that lawyers and judges who think that the law is discoverable and that continuity and certainty are indispensable have criticized the Court's handling of preemption problems.

If the "tests of supercession" which are inconsistently applied by the Court are themselves lacking in definition or priority, what is the touchstone of decision? It is hard to escape the feeling that the use or non-use of particular tests, as well as their content, is influenced more by judicial reaction to the desirability of the state legislation brought into question than by the metaphorical sign-language of "occupation of the field." And it would seem that this is largely unavoidable. The Court, in order to determine an unexpressed congressional intent, has undertaken the task of making the independent judgment of social values that Congress has failed to make. In making this determination, the Court's evaluation of the desirability of overlapping regulatory schemes or overlapping criminal sanctions cannot but be a substantial factor.

Much difficulty might have been avoided if the Court long ago had adopted actual repugnancy as an exclusive test of supercession. This test is relatively simple of application and comparatively free from subjectivity. Nevertheless, it reflects important postulates of federalism: the maintenance of local control over matters in which there is a local interest and the undesirability of centralization of power in the national government. Each government could protect its own interest, while the Court would confine its activity to the adjudication of alleged conflicts as they arose and the determination of constitutional issues created by the existence of dual sovereignty. Congress, of course, would be free to preclude state authority from a particular field if it thought it desirable.

The major objection to the conflict test is that it might fail to invalidate state regulation which, while not clashing head on, impairs the operation of the federal scheme, thus imposing a burden on Congress to make specific preclusions of state authority. The objection does not seem valid. The purpose and function of a statute is as much a part of the legislation as its specific terms, and any serious impairment of the federal regulatory scheme should be classed as an actual conflict. But the impairment should be actual rather than presumed or anticipated.

In evaluating the performance of the Court, the failure of Congress to provide satisfactory guidance should not be overlooked. Increased congressional attention to the working details of federalism is greatly to be desired. Heightened congressional awareness

of the implications of its legislation on the federal system; and greater care in legislative drafting to avoid or resolve such matters, would produce important gains.

II. LIMITATIONS ON STATE LEGISLATIVE INVESTIGATIONS—THE *SWEEZY* CASE

The power of state legislatures to compel testimony during the conduct of legislative investigations is unquestioned, but the constitutional limitations on this power have been relatively unexplored. In *Sweezy* v. *New Hampshire*,[138] the Supreme Court for the first time considered the right of witnesses to remain silent before state legislative committees. Although the decision suggests that free expression of ideas will outweigh a state's need for information, at least when subversive activities are involved, the case provides little guidance as to the controlling factors in balancing the interest of the state against the constitutional rights of the witness. Since the *Sweezy* case grows out of the more developed law dealing with limitations on congressional investigating power and builds on the foundation laid in the companion case of *Watkins* v. *United States*,[139] a brief survey of the federal development seems necessary before turning to the special problems in the state area.

Limitations on Congressional Power

Various constitutional provisions have been relied upon as imposing affirmative constitutional limitations on the power of Congress to compel testimony in congressional investigations. The fifth amendment privilege against self-incrimination has proved to be the surest means of frustrating congressional questioners, but at a cost which the witness often finds too great. Initially there was some doubt whether the privilege was applicable to legislative investigations as distinguished from judicial proceedings. Lower federal courts took the initiative in recognizing the applicability of the privilege to legislative investigations,[140] and this view is now firmly established.[141] The marked tendency in recent years to relax the showing which must be made by a witness claiming the privilege[142] has made the fifth amendment the most popular refuge of reluctant witnesses. But the use of the privilege may be disadvantageous even though a claim of privilege is almost certain to be upheld whenever the questions relate to alleged communist activities. In the first place, adverse publicity is almost inevitable. Secondly, if security tests are prevalent in the field of public or private employment in which the witness is engaged, the use of the privilege may result in discharge and loss of employment opportunities. It is for this reason that one of the crucial issues in recent years has been the extent to which adverse inferences might be drawn from the use of the privilege against self-incrimination.[143]

The disadvantages of relying on the privilege against self-incrimination have led to an exploration of other constitutional provisions as limitations on congressional investigations. The fourth amendment prohibition of unreasonable searches and seizures has been suggested as a limit on the breadth of legislative demands to produce documents,[144] but this seems doubtful since a physical invasion of the witness's person or premises is not involved.[145] The emphasis in congressional investigations of the last few decades on political activity and beliefs has led to numerous attempts to justify refusals to testify under the first amendment guarantee of freedom of speech.[146] Although first amendment rights have been recognized in several cases, in each case the legislative need for information has been held to outweigh the individual's interest.[147] Thus reliance on the first amendment has proved unsuccessful when congressional investigations have been involved. The impact of various inquiries on first amendment rights, however, has been a significant factor in the development of statutory, procedural and due process limitations on congressional investigations.

Three principal limitations have been developed. First, the investigation must have a valid legislative purpose in seeking information concerning a subject with which Congress may legislate.[148] Second, the investigating committee must have been specifically authorized by Congress to conduct the investigation in question.[149] And finally, the questions asked must be "pertinent to the question under inquiry."[150] These limitations, applied rather strictly because of the involvement of constitutional rights, have their source both in the contempt of Congress statute[151] and in the Constitution.[152]

In *Watkins* v. *United States*,[153] the Supreme Court, fusing first amendment arguments and existing procedural limitations, evolved a new and somewhat confusing procedural limitation on congressional investigative power. Watkins, a labor organizer, was summoned to appear before a sub-committee of the House Committee on Un-American Activities after two witnesses had testified that he had been a member of the Communist Party in 1944. Watkins denied that he had been a Communist and answered freely all questions relating to his political activities and associations. He declined, however, to answer questions relating to the political activities of past associates whom he did not believe were presently members of the Communist Party.[154] He did not invoke the privilege against self-incrimination, but contended that the committee had no power to ask such questions and that they were not relevant to any valid

legislative purpose. For his refusal to answer, Watkins was indicted and convicted for statutory contempt of Congress. The Court of Appeals for the District of Columbia Circuit, sitting *en banc*, affirmed the conviction.[155]

The Supreme Court reversed Watkins' conviction.[156] The majority opinion by the Chief Justice, a long and discursive essay on legislative investigations and constitutional rights, is lacking in clarity. But as Mr. Justice Frankfurter emphasized in his concurring opinion, the narrow holding of the case is only that the vagueness of the authorizing resolution and the undefined scope of the subcommittee inquiry failed to satisfy the due process requirements of definiteness.[157]

The House of Representatives had authorized the Un-American Activities Committee and its subcommittees to investigate all aspects "of un-American propaganda . . . [which] attacks the principle of the form of government as guaranteed by our Constitution . . . "[158] This resolution was thought to be so vague and broad that it did not inform Watkins what questions it authorized the subcommittee to ask. Nor did the subcommittee chairman, at the opening of the hearing, explain the scope and nature of the inquiry with sufficient particularity to enable Watkins to determine what questions would be relevant to the matter under inquiry.[159] The statute under which Watkins was convicted condemns only a refusal to answer questions which are "pertinent" to the inquiry, thus making pertinency an element of the offense.[160] Since Watkins was put in the position of being unable to ascertain the conduct required of him by law, due process standards of definiteness in criminal prosecutions were violated by his conviction.[161]

This holding marks some advance over prior doctrine, but is not a startling or unexpected development. The surprising features of the *Watkins* case are the suggestions in the opinoin of the Chief Justice that congressional investigations will be subjected in the future to delegation of power and first amendment limitations.

The emphasis on delegation of power comes in a portion of the opinion which stresses the separation of responsibility for exercise of investigative power from the actual exercise of that power.[162] The concern is with the relationship between the legislative body and the investigative body, and the requirement is that the legislature set forth with some clarity the authority of the investigatory body to conduct an investigation serving a valid legislative purpose. The vice of unconfined discretion in investigation is twofold: it is impossible for the witness to know whether or not the questions are pertinent to a valid inquiry, and, in addition, it is impossible for a court to know whether the parent body really wants the information being gathered by its investigators. The former is merely a restatement of the due process vagueness objection; the latter is apparently based on a concern that judicial review will be frustrated if the legislature does not circumscribe the authority of its investigators in terms which a court can assess.

One emphatic statement in the Chief Justice's opinion deserves repeating: " . . . there is no congressional power to expose for the sake of exposure."[163] The basis for this asserted limitation on the scope of legislative power presumably is that exposure is a form of punishment and punishment for past acts is a non-legislative function. Separation of powers concepts were formerly applied to legislative investigations. In *Kilbourn* v. *Thompson*[164] these concepts were utilized to supply a holding that Congress, in conducting an investigation into the operation of a real-estate pool in which the United States had a creditor's interest, usurped a judicial function and thus exceeded its own power. Subsequent cases cast doubt on this rationale,[165] but *Watkins* appears to have given it a rebirth. If so, the validity of the so-called "ventilating" investigation, in which Congress seeks to educate and inform the public in order to arouse popular support for particular legislation, is questionable. The Court, however, is careful to say: "The public is, of course, entitled to be informed concerning the workings of its government."[166] This and other statements leave the impression that "exposure" may have a wider scope when it is government officials, rather than private citizens, who are being grilled. This would appear to be a sound distinction.

The impact of legislative investigations on first amendment rights is sketched in equally broad fashion. The first amendment is applicable to legislative investigations because they are "part of lawmaking."[167] The interest protected is the individual's right to participate fully in the political process without answering to the state for that activity, as well as the indirect inhibition on political discussion which may result from a fear that expression of unorthodox views may lead to public obloquy. To compel a witness "to testify against his will, about his beliefs, expressions, or associations is a measure of government interference"[168] with first amendment freedoms which is not to be allowed in the absence of a clear showing that the public necessity for the information outweighs the inevitable impact on individual freedom. The Court, in the last analysis, must strike this balance; but in order to do so it must be able to measure the legislative need for the information. In order to weigh this need against the competing demands of individual expression, a "clear determination by the House or the Senate that a particular inquiry is

justified by a specific legislative need" must be provided.[169] The devitalization of judicial review once again appears to be the vice which demands clarity of legislative authorizations.

This jumble of constitutional and procedural limitations—the pertinency of the questions to the inquiry, the validity of the delegation to the committee, the constitutional validity of the legislative purpose, and the impact of the investigation on first amendment guarantees—necessarily entails considerable confusion. But it is doubtful that the confusion is entirely unintentional. A substantial majority of the Court has joined in an opinion which combines exhortation with warning. Without deciding any questions of power, it has cautioned Congress that the unrestricted intrusion of legislative investigations into private affairs will not, if continued, go unchecked. Meanwhile, new procedural limitations will operate to protect witnesses and enhance judicial review.

Limitations on State Legislative Investigations

Many of these principles are also relevant to the power of state legislatures to compel testimony in the course of legislative investigations. The scope of state investigatory power is a question of state law and varies from state to state depending upon the respective constitutional provisions and their judicial interpretation. In general, the investigatory power of the state legislatures, like that of Congress,[170] may be employed whenever appropriate to an exercise of recognized legislative powers.[171] Similarly, the federal Constitution imposes significant limitations on the exercise of investigative powers by state legislatures. Freedom of speech is a fundamental right protected against state abridgment through the due process clause of the fourteenth amendment.[172] The fourth and fifth amendments, however, are not carried over into the fourteenth amendment with the same thoroughness,[173] and thus are less important limitations.[174] The other major limitation is, of course, the due process clause of the fourteenth amendment.

In *Sweezy* v. *New Hampshire*,[175] the Court's dicta in *Watkins* are the foundation for a holding which merges first amendment and due process notions. In 1951 New Hampshire enacted a Subversive Activities Act [176] which imposed various disabilities on "subversive persons" and "subversive organizations." In 1953 a resolution of the legislature[177] constituted the attorney general a one-man legislative committee to investigate violations of the 1951 act and to recommend additional legislation. Sweezy, a non-Communist Marxist, was summoned to testify at the investigation conducted by the attorney general pursuant to this authorization. Sweezy testified freely about many matters but refused to answer two types of questions: (1) inquiries concerning the activities of the Progressive Party in the state during the 1948 campaign; and (2) inquiries concerning a lecture Sweezy had delivered during 1954 to a class at the University of New Hampshire.[178] For these failures to answer, Sweezy was adjudged in contempt by a state court. The New Hampshire Supreme Court, recognizing that the legislative investigation impaired Sweezy's first amendment rights, affirmed the contempt commitment on the ground that the state's interest in uncovering subversive activities within the state justified the impairment.[179]

The Supreme Court reversed, but no opinion was able to obtain a clear majority of the Court.[180] The Chief Justice, joined by Justices Black, Douglas, and Brennan, began by reaffirming the position adopted in the *Watkins* case that legislative investigations can encroach on first amendment rights. He then turned his fire on the New Hampshire Subversive Activities Act of 1951, to which the scope of the attorney general's authority had been tied by the authorizing resolution. The definition of "subversive persons" and "subversive organizations" in this act were said to be so vague and limitless that they extended to "conduct which is only remotely related to actual subversion and which is done free of any conscious intent to be a part of such activity."[181] The opinion then went on to discuss gratuitously and at some length the importance of academic freedom and political expression, emphasizing that a strong showing of justification would be necessary to permit any infringement in these areas.[182] Finally, the Chief Justice concluded, it was unnecessary in this case to balance the interest of the state against the rights of the individual—the resolution authorizing the investigation was so broad and unlimited that a valid state interest had not been expressed.

> "The respective roles of the legislature and the investigator thus revealed are of considerable significance to the issue before us. It is eminently clear that the basic discretion of determining the direction of the legislative inquiry has been turned over to the investigative agency. The Attorney General has been given such a sweeping and uncertain mandate that it is his decision which picks out the subjects that will be pursued, what witness will be summoned and what questions will be asked. *In this circumstance, it cannot be stated authoritatively that the legislature asked the Attorney General to gather the kind of facts comprised in the subjects upon which petitioner was interrogated.*"[183]

Four members of the Court, in concurring and dissenting opinions, took vigorous issue with the Chief Justice for suggesting that the conviction was invalid

because of the legislature's failure to provide adequate standards for the attorney general. They argued that the appointment and delegation of powers within a state government are matters of state law beyond the reach of the fourteenth amendment.[184] Since the New Hampshire court had determined that the attorney general had acted within the scope of the authority granted him by the legislature, the Court was required to balance the legislative need for the information against the impairment of first amendment rights which the investigation entailed. Mr. Justice Frankfurter, joined by Mr. Justice Harlan, concluded that the individual must prevail in this case because there was no basis for a belief that Sweezy or the Progressive Party threatened the safety of the state;[185] whereas Mr. Justice Clark, joined by Mr. Justice Burton, arrived at the opposite conclusion that New Hampshire's interest in self-preservation justified the intrusion into Sweezy's personal affairs.[186]

The most puzzling aspect of the *Sweezy* case is the reliance by the Chief Justice on delegation of power conceptions. New Hampshire had determined that it wanted the information which Sweezy refused to give; to say that the state has not demonstrated that it wanted the information seems so unreal as to be incredible. The state had delegated power to the attorney general to determine the scope of inquiry within the general subject of subversive activities. Under these circumstances the conclusion of the Chief Justice that the vagueness of the resolution violates the due process clause must be, despite his protestations,[187] a holding that a state legislature cannot delegate such power. It seems unlikely that the view of the Chief Justice, which has yet to commend itself to a majority of the Court, will receive long-run acceptance.

The generative power of the *Sweezy-Watkins* cases is yet to be determined. The *Watkins* case involves a more conventional holding and is therefore easier to justify. Thus far its major impact has been to encourage lower federal courts to interpret strictly congressional authorizing resolutions.[188] It is likely that Congress will be required to delegate investigative power with greater care; that committee chairmen will be required to clarify the pertinence of particular questions to the matter under inquiry; and that the free-wheeling character of many congressional investigations will be reduced but not eliminated.[189] On the other hand, it seems unlikely that the Court will impose severe restrictions on the power of congressional investigation itself.

The impact of the *Sweezy* case on state investigations is likely to be more marked. The Court apparently feels that subversion is a federal problem which should be dealt with by the federal government. Although it has been reluctant to impose a constitutional limitation on state power to investigate subversive activity, the reduced operation of state law in this field may make it difficult for a state to justify an investigation which substantially infringes first amendment rights.[190] Justices Frankfurter and Harlan have already indicated that a severe burden rests on the states: it must demonstrate an existing threat to the safety of the state. It is not likely that the Chief Justice, and Justices Black, Douglas and Brennan will require a lesser showing of justification. They have already announced in language of unmistakable breadth that "We do not now conceive of any circumstance wherein a state interest would justify infringement of rights in these fields [academic freedom and political expression]."[191] But it is unnecessary to hazard guesses on such unpredictable matters. *Uphaus* v. *Wyman*,[192] now pending in the Supreme Court, squarely presents on similar facts the first amendment question left open in the *Sweezy* case. The scope of the *Sweezy* decision is likely to be much clearer in a very short time.

III. LIMITATIONS ON STATE POWER TO IMPOSE CIVIL DISQUALIFICATIONS

The extent of state power to impose civil disqualifications (loss of voting rights, denial of employment opportunities, loss of privileges and benefits, etc.) on persons and organizations considered subversive is not entirely clear and the law is still in the course of development. It is impossible in brief compass to canvass the entire subject.[193] However, the Supreme Court decisions in three important areas will be discussed: disqualification from public employment, disqualification from private employment, and the implications of a claimed right to silence.

Disqualification from Public Employment

It is unnecessary to pause over the semantic battle as to whether public employment is a "privilege" or a "right," for nothing should turn on such a barren classification. More intricate distinctions determine constitutional rights. It is clear, on the one hand, that the Constitution does not guarantee public office to anyone. Any governmental body can impose appropriate requirements to secure public employees who are qualified to discharge the manifold tasks of government.[194] On the other hand, the due process clause of the fourteenth amendment prohibits state and local governments from arbitrarily excluding persons from public employment on grounds which have no rational relation to suitability for such employment.[195] Similarly, the equal protection clause forbids a discriminatory classification, unrelated to fitness, which excludes a group of persons from public em-

ployment.[196] These principles serve as a foundation for dealing with the issues raised by statutes requiring a non-communist oath of public employees.

Garner v. *Board of Public Works*[197] is one of the leading cases. A 1941 amendment to the Los Angeles charter disqualified from municipal employment all persons declining to take an oath that they did not advocate the overthrow of the government by unlawful means or belong to organizations with such objectives. This charter amendment was implemented in 1948 by an ordinance requiring all city employees (1) to execute an affidavit "stating whether or not he is or ever was a member of the Communist Party . . .,"[198] and (2) to take an oath that presently or within the five preceding years they had not advocated the overthrow of the government by unlawful means or belonged to organizations with such objectives. Two municipal employees took the oath but refused to execute the affidavit; thirteen others refused to do either. After being discharged for these refusals, they brought an action in a state court for reinstatement and unpaid salaries. The state court denied relief,[199] and the Supreme Court affirmed.[200]

The Court treated the affidavit and the oath as raising distinct issues. The issue raised by the affidavit was simply whether a city might require its employees to disclose membership in the Communist Party. Seven members of the Court thought the answer clear.[201] Public employees could be required to disclose any matter relevant to a determination of present fitness and suitability for public service. In the context of the 1950's, membership in the Communist Party was relevant "to effective and dependable goverment, and to the confidence of the electorate in its government."[202] Government need not place its trust in persons dedicated to overthrow the government by force and violence. The Court emphasized, however, that since the dismissals of the two employees who refused to execute the affidavit rested on their refusals to supply relevant information, no question was presented as to whether a discharge might be based on information in an affidavit, such as an admission of past membership in the Communist Party.[203]

A bare majority of the Court justified the oath on somewhat different grounds.[204] The 1941 charter amendment was said to deny city employment to any persons who thereafter should fail to comply with its requirements of loyalty. The oath did not have a retrospective operation because it implemented the charter amendment, imposing the identical standard in the form of an oath covering the period 1945-1948. Nor was it invalid as a bill of attainder since it did not inflict punishment, but "merely provide[d] standards of qualification and eligibility for employment."[205] A contention that the oath violated the due process clause because it was not limited to knowing membership in the proscribed organizations was avoided by an adroit rewriting of the municipal ordinance. The ordinance did not in terms require *scienter;* nevertheless the Court assumed that *scienter* was implicit in each clause of the oath. Mr. Justice Frankfurter, believing that it was improper for the Court to imply such a requirement in the absence of a state court interpretation, dissented from this portion of the case. Justices Black, Douglas and Burton also dissented from the Court's validation of the oath, arguing that it was invalid as a bill of attainder since it operated retrospectively as a perpetual bar to employees who held certain views at any time since a date five years preceding the effective date of the ordinance.

The *Garner* case, therefore, is a square holding that present or recent membership in the Communist Party or any other organization with illegal objectives is relevant to the fitness of persons for public employment, and that a refusal to supply information relating to such membership or to take an oath of non-membership is grounds for discharge from public employment. A necessary presupposition to this holding is that "No unit of government can be denied the right to keep out of its employ those who seek to overthrow the government by force or violence, or are knowingly members of an organization engaged in such endeavor."[206]

Gerende v. *Board of Supervisors*[207] and *Adler* v. *Board of Education*[208] applied similar principles to related situations. The *Gerende* case indicated that eligibility for elective office could be conditioned on the execution of a loyalty oath negating knowing membership in organizations engaged in an attempt to overthrow the government by force and violence. The *Adler* case, validating an involved statutory scheme which sought to bar from employment in the public schools persons who advocate, or belong to organizations which advocate, the overthrow of the government by unlawful means, is a less satisfactory precedent. The Court's opinion appears to rely heavily on the "privilege" concept and contains broad language which the Court certainly no longer accepts.[209] Secondly, as Mr. Justice Frankfurter pointed out in his dissenting opinion, the Court upheld the statutory scheme before it had been applied against any individuals or interpreted by the state courts, thus violating the Court's self-imposed jurisdictional limitations of standing and ripeness.

Each of these cases contained strong intimations that a loyalty oath or other procedure which disqualified individuals on the basis of innocent membership in the Communist Party would be invalid.[210] *Wieman* v. *Updegraff*[211] fulfilled these intimations by holding that "Indiscriminate classification of innocent

with knowing activity" is an "assertion of arbitrary power" which violates the due process clause of the fourteenth amendment.[212] An Oklahoma statute required state officers and employees to take a loyalty oath that they were not and for five years immediately preceding the taking of the oath had not been affiliated with or members of organizations on the Attorney General's list of subversive organizations. The Court interpreted state court decisions involving the oath as construing it so as to exclude persons solely on the basis of organizational membership, regardless of their knowledge concerning the organization. The innocent member thus received the same treatment as the person aware of illegal purposes. The Court was unanimous in holding that membership in organizations advocating overthrow of government, if it is to be the ground for disqualification from public employment, must be a *knowing* membership.

The *Wieman* case was a harbinger of the future in several respects. Concurring opinions of Mr. Justice Black and Mr. Justice Frankfurter, joined by Mr. Justice Douglas, emphasized that the loyalty oath was being applied to teachers and expressed their views that freedom of expression was imperiled by loyalty oaths and that any such impact on the educational system should be subjected to great scrutiny. That three members of the Court should express themselves so strongly indicated, as the *Sweezy* case[213] tended to prove, that academic freedom will be given first amendment protection against impairment by state authorities. Perhaps even more important is the Court's unanimous view that eligibility for public employment can only be conditioned on requirements which have a rational relationship to fitness. The Court is thus committed to a review and assessment of state-imposed limitations on public employment. The extension of this requirement to state-imposed limitations on private employment in *Schware* v. *Board of Bar Examiners*[214] should not have been surprising.

Disqualification from Private Employment

In earlier days of occupational licensing, the Supreme Court reviewed state limitations which restricted occupational choice with an erratic but recurring zeal.[215] The right of a citizen "to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling . . ."[216] were among the rights protected against state action by the due process clause of the fourteenth amendment. But even in these earlier days of judicial activism in the review of state economic legislation, it was unquestioned that the states, in order to protect the public, could impose reasonable restraints on a citizen's freedom to choose his work.[217] And in more recent years the Supreme Court has virtually abdicated judicial review of state licensing statutes.[218] The states, it was said, could regulate any occupation provided the regulation had some reasonable basis in a public interest. Since a tenable argument can be made in almost any case that the public health, welfare, safety, or morals is adversely affected by "unfit" persons engaging in the restricted work or by "unfair practices" which the regulation aims to prevent, few occupational licensing statutes have been subjected to successful constitutional attack. The Court's application of a presumption that conditions exist which support the legislative judgment,[219] and its refusal to inquire into legislative motives, have limited the scope of review to a point where regulatory schemes involving the most invidious discriminations have been upheld.[220] Unless *Schware* v. *Board of Bar Examiners*[221] is based solely on the fact that a former Communist was involved, it would seem to indicate that the Court may reenter the occupational licensing field and strike down licensing requirements which have little or no rational relation to fitness for the occupation in question.

Schware, after graduating from law school, petitioned the New Mexico board of Bar Examiners for permission to take the 1954 bar examination. The Board, after a hearing, denied permission on the ground that he had failed to show the good moral character required by statute of applicants to the bar. The New Mexico Supreme Court affirmed the denial,[222] and the Supreme Court, in an opinion by Mr. Justice Black, reversed.[223] The Court concluded that the denial offended due process because there was no evidence which rationally justified the state's finding that Schware was morally unqualified for the practice of law. Mr. Justice Frankfurter, joined by Justices Clark and Harlan, concurred on the ground that the state court was unwarranted in concluding that Schware's past communist affiliation made him "a person of questionable character."

The *Schware* case is significant in several respects. First, as noted above, it indicates that freedom of occupational choice is an important freedom which is protected by the due process clause. The *Wieman* case[224] established that public employment was not a "privilege" which could be denied for any reason whatsoever. Now it appears that a similar protection is to be accorded to persons arbitrarily excluded from the occupation of their choice. My own view is that this is neither an unfortunate nor an incorrect development. The freedom to choose work of one's choice is surely a most important freedom, whether it be considered as "property" or "liberty." The mushrooming of occupational restrictions in the United States, the increasing tendency to allow regulated groups to control entry into various occupations, and the growing

irrelevancy to fitness of many of the requirements which have been imposed combine to greatly restrict occupational freedom.[225] Many young Americans who can aspire to be President of the United States must resign themselves to the fact that they cannot become barbers, carpenters, chiropodists, electricians, funeral directors, hypertrichologists, pharmacists, photographers, plumbers, and veterinarians, among others. Perhaps it is time that the multiplying restrictions on occupational choice were subjected to the basic requirements of decency and rationality emanating from the due process clause of the fourteenth amendment.

More questionable, however, is the willingness of the majority of the Court in the *Schware* case to undertake an independent determination of the facts. The case did not involve a legislative preclusion of a class of persons, as in *Wieman*, but a factual determination that a particular individual did not meet an accepted standard—good moral character. The New Mexico bar examiner and the New Mexico Supreme Court had based their conclusion that Schware had failed to show good moral character on Schware's use of aliases, his record of arrests, and his past membership in the Communist Party. The Court considered each of these factors in detail and rejected each as rationally justifying the finding.

Schware had used aliases between 1933 and 1937 in order to obtain work and to further his efforts as a labor organizer; his arrests on various charges had been adequately explained and in each instance the charges had been dropped; and he had been a member of the Communist Party from 1932 to 1940, but had had no connection with communist activities since that time. The Court concluded that the use of aliases for a lawful purpose did not reflect on moral character; that arrests without convictions were of slight probative value; and that membership in the Communist Party during a period when it was a lawful political party, absent any showing that Schware was aware of possible illegal purposes or participated in illegal acts, could not serve as the basis for a finding of bad moral character, especially when the persuasive evidence of present good character in the record was taken into account.

The air of reasonableness prevading the Court's opinion should not obscure the fact that the technique and scope of constitutional review was at issue. Should the Court, in constitutional cases, make an independent assessment of the facts on the basis of a reading of the record, rejecting the demeanor evidence relied on by the trier of fact? The Court has done this for a good many years in coerced confession cases.[226] Perhaps the Court feels that when such issues are involved popular pressure and prejudice against minority groups combine to decrease the ability of state courts to determine the facts fairly. And the Court may have a similar fear when Communists are involved.

Of course, the absence of any evidence in a record to support an essential finding of fact is itself a question of law. A finding without a rational basis is an arbitrary and lawless finding, and subject to attack as such under the due process clause. Whenever constitutional issues are presented, the Court, in order to preserve its own power to determine such issues with finality, must retain the power to look beyond the findings of the state court. Thus the power exists and is necessary, but situations calling for its exercise should be rare. In the vast majority of cases coming from state courts, the Court should and does give deference to and follow the findings of fact of the state court.[227]

It is doubtful if the *Schware* case is one of those extraordinary cases where the Court should look beyond the factual determinations of the state court. Demeanor evidence should play an important part in determinations of moral character. The bar examiners, as the triers of fact, were free to reject some or all of Schware's self-serving testimony. It is for these reasons that the concurring opinion of Mr. Justice Frankfurter, joined by Justices Clark and Harlan, is founded on sounder ground.

Mr. Justice Frankfurter read the opinion of the New Mexico Supreme Court as based primarily on its belief that "one who has knowingly given his loyalties to such a program and belief [communism] for six to seven years during a period of responsible adulthood is a person of questionable character."[228] To draw an inference of present unsuitability from the fact that a person had been a member of the Communist Party fifteen years before, at a time when such membership was not only lawful but fashionable, was "so dogmatic an inference as to be wholly unwarranted."[229] Although it was beyond the function of the Court "to act as overseer of a particular result on the procedure established by a particular State for admission to its bar,"[230] what the state had done, in effect, was to create an irrebutable presumption of bad moral character from the fact of past Communist Party membership. This the due process clause prohibited.

A Right to Silence?

Observers of the onward march of security tests for public and private employment have asserted with regret that the typical casualty of such measures was not a hardened Communist but a loyal citizen of conscientious scruples.[231] Although this observation is incapable of proof, it does seem likely that the net cast for subversives has brought forth many innocent fish. Of course, if the security measure invades the privacy of the conscience, the first amendment may allow the individual to remain silent.[232] Religious inquiries are

the most obvious case, but similar protection may be accorded to political beliefs and to academic discussion. The *Sweezy* case[233] indicates that inquiries concerning lawful political activities such as the Progressive Party in 1948 and intellectual exchange such as the academic discussion of socialism will be restricted. Even where the first amendment provides no protection, the requirement that membership or conduct have taken place with knowledge of unlawful purposes tends to protect the innocent.[234] Substantial disqualifications cannot be predicated on mere guilt by association. But these approaches may still not be sufficient to safeguard the sincere individual who refuses on principle to take an oath, sign an affidavit, or cooperate in what he feels is an unjust and unlawful inquiry. The impact of security measures on the conscientious objector thus raises the complex issue of whether there is a right to silence.

The problem has several dimensions. First, does the Constitution entitle the conscientious objector to special treatment? On principle, the answer seems clear. If the state has not invaded the area protected by the first amendment, and the measure in its general application meets the requirements of the due process clause, the individual who objects to it on grounds of conscience is entitled to no more consideration than is received by those persons the legislature sought to penalize. Second, there is the problem of what inferences may be drawn from a refusal to cooperate. Most security measures do not contain specific provisions for the non-cooperative individual, and the usual device has been to infer misconduct from a refusal to answer relevant questions and even from a claim of the privilege against self-incrimination. Is this permissible? Finally, there is the problem of identification: when is an individual acting in good faith? If security measures were drafted in such a fashion that a good faith exercise of conscience would except an individual from their application, this issue would be determined by state agencies in the same manner as other factual issues. But existing security measures fail to make specific provision for the stubborn man of principle. Yet there may be a judicial desire to exempt such an individual from the general operation of loyalty tests. Important issues of judicial review are raised when the Supreme Court makes independent factual determinations of such ambiguous matters as "good faith" or "good moral character."

The Court has not yet had a full opportunity to explore all of these questions. Moreover, in those cases in which the questions have arisen the Court has been bitterly divided. The absence of a stable majority and recent changes in the personnel of the Court make it likely that further change will take place. A survey of existing cases, accompanied by a few comments for the future, is all that will be attempted here.

In the first few of the recent cases involving the impact of loyalty tests on the conscientious objector, the Court proved unreceptive to claims of a right to silence,[235] which was usually said to emanate from the first amendment. The first case bearing on the existence and dimensions of a due process clause "right to silence" was *Slochower* v. *Board of Education*,[236] involving the discharge of a public school teacher following his claim of the privilege against self-incrimination before a congressional committee. The Court held, 5-4, that a discharge predicated on the invocation of the fifth amendment before a congressional committee violated the due process clause. The majority opinion roundly condemns any imputation of guilt based on the use of the fifth amendment, and contains broad language to the effect that the due process clause protects any invocation of a constitutional right. Although the language of the opinion suggested that a good faith refusal on constitutional grounds to answer questions would be protected, the holding of the case would appear to be more narrowly confined to its peculiar facts.

Slochower, a professor with long experience and good record at Brooklyn College, was suspended shortly after he had invoked the fifth amendment before a Senate subcommittee. Section 903 of the New York City charter made his dismissal automatic. Since the Senate inquiry at which Slochower invoked the privilege was not directed to his fitness to hold a teaching position and the state had not asked him for an explanation for his use of the privilege, the Court was able to interpret the state action as based on an automatic inference of guilt arising from the exercise of the constitutional privilege.[237] Thus the case did not decide that a state cannot discharge an employee for refusal to answer inquiries relevant to his fitness directed to him by state officials.[238] Nor did it decide that a state cannot draw an inference from a failure of a state employee to adequately explain the use of the privilege.

About a year later, when the Supreme Court decided *Konigsberg* v. *State Bar of California*,[239] it appeared that the dicta of the *Slochower* opinion had become constitutional doctrine. Konigsberg had been denied admission to the California bar on the grounds that he had failed to prove (1) that he did not advocate overthrow of the government of the United States or of California by unconstitutional means, and (2) that he was of good moral character. The record, which contained testimonials from 42 persons as to Konigsberg's good character, also contained testimony that Konigsberg had attended Communist Party meetings in 1941 and had written a vitriolic series of

articles criticizing public officials and their policies. Konigsberg answered the direct question, "Do you advocate overthrow of the government of the United States or of this State by force or violence or other unconstitutional means?" in the negative, but refused on first amendment grounds to answer any other questions relating to his political beliefs and associations. The California Supreme Court declined to review Konigsberg's petition, without opinion,[240] and, on certiorari, the Supreme Court reversed.

Mr. Justice Black, speaking for a majority of five, reviewed the record in detail, as he had done in *Schware,* and concluded that there was no evidence rationally justifying the findings of the bar examiners. Mr. Justice Frankfurter dissented on jurisdictional grounds, urging that the case should be remanded to the state court for a certification of the grounds of its declination to review. Mr. Justice Harlan, joined by Mr. Justice Clark, dissented both on the jurisdictional issue and on the merits.

The majority opinion of Mr. Justice Black comes very close to holding that a state cannot draw unfavorable inferences from a mistaken but honest refusal to answer relevant questions. While intimating that it would be unconstitutional for admission to the bar to be denied solely on the basis of a good faith refusal to answer, decision of this issue was avoided with the explanation that California had not based the denial on this ground. Yet this was done only by ignoring the insistence placed on this matter by the bar examiners and by finding, contrary to the implied finding of the state, that the refusal to cooperate was in "good faith." Although the majority did not question the state rule that the applicant has the burden of proving his fitness, the decision must be interpreted either as ignoring the burden of proof or as holding that the applicant satisfies the burden by introducing testimonial letters with respect to good moral character. In either event, the state is required to produce affirmative evidence of present lack of moral character in order to deny admission, and the lack of such evidence deprives the findings of any rational basis and thus offends due process. The applicant's refusal to cooperate can apparently be given little if any significance.

Mr. Justice Harlan's dissenting opinion[241] demonstrates in convincing fashion that the majority misconceived the question at issue. The majority stated the issue as being whether the record contained evidence establishing that Konigsberg had a bad moral character. His refusal to answer any questions other than his bare denial that he did not advocate overthrow of government by unconstitutional means was treated as raising an entirely separate question, and, since the state had not rested its denial of admission *solely* on that ground, was given no significance whatsoever. Mr. Justice Harlan's detailed analysis of the record, however, leaves little doubt that Konigberg's refusal to supply the bar examiners with the information they needed to make a determination with respect to his moral character was a crucial element in the examiners' decision that Konigsberg had not carried his burden of proof.

The implications of the *Konigsberg* case for the technique of judicial review would be somewhat alarming if it were not for the fact that subsequent decisions have greatly reduced its significance.[242] As things presently stand, the case evidences a willingness on the part of some members of the Court to make independent factual determinations from a printed record of such delicate matters as whether a person's refusal to answer questions was honest even though mistaken. For the *Konigsberg* majority seems to be saying that if an individual's refusal to cooperate is found—by a majority of the Supreme Court—to be in good faith, and the record does not contain other evidence which in itself warrants the result reached by the state, the action of the state must be set aside.[243] Thus *Konigsberg* is a much more far-reaching holding than *Schware,*[244] which holds only that a state cannot disqualify a person from engaging in the occupation of his choice unless the basis for disqualification has a rational relation to unfitness for the occupation.

The vicissitudes during the Supreme Court's 1957 Term of the right to silence which the *Konigsberg* case appeared to recognize demonstrated once again the particularity with which constitutional development takes place. In *Beilan* v. *Board of Public Education,*[245] a public school teacher was discharged for "incompetency" after many years of satisfactory service because of a 1953 refusal to answer any questions put to him by his superior relating to past membership in communist groups. The issue seemingly decided by *Konigsberg* was cleanly posed: May a state discharge a person solely on the basis of a refusal to answer relevant questions, or is it necessary that there be other affirmative evidence of unfitness? A differently constituted majority found the answer almost self-evident—it was permissible for a state to draw an inference of unfitness or lack of dependability from a refusal to answer relevant questions.

The *Beilan* and *Konigsberg* cases seem to be incompatible in principle as well as spirit.[246] The Court's opinion in *Beilan* attempted to distinguish *Konigsberg* by stating that the action of the state in *Konigsberg* "was not based on the refusal to answer relevant questions—rather, it was based on inferences impermissibly drawn from the refusal," whereas in *Beilan* "no inferences at all were drawn from petitioner's refusal to

answer."[247] The refusal itself operated to effectuate the discharge. This attempted distinction fails to penetrate beneath the surface of either case, treating one as wholly a refusal-to-answer case and the other as an impermissible-inference case. Categorization as one or the other appears to depend on nothing more than the verbal choices made by the state court. Thus *Konigsberg*, although it remains as a case which a future Court may build on, is reduced in import because its application can be so easily avoided.

A companion case to *Beilan, Lerner* v. *Casey*,[248] dealt more directly with the permissible inference that can be drawn from the use of the privilege against self-incrimination.[249] Lerner, a New York City subway conductor, was discharged by the Transit Authority because of the doubt created as to his "reliability" by his claim of the privilege against self-incrimination when asked by city officials concerning current membership in the Communist Party. The Court held, again 5-4, that the inference of unreliability was permissible.[250] The *Slochower* case was distinguished on the valid grounds that Lerner had been questioned by state rather than federal officers; that these officers had authority to ask questions relating to subversive activity in connection with fitness for employment; and that the state had not made an inference of disloyalty from the use of the privilege, but only of "unreliability." The Court also emphasized that the fifth amendment privilege was not available to Lerner in a state investigation, and hence the state had as much right to discharge him for failure to answer as it would have had in the absence of a claim of privilege.

It should be noted that the questions put to Lerner related to current rather than past membership in the Communist Party. If a refusal to answer under such circumstances had not been treated as permitting an inference of unfitness, the Court would have traveled full circle, and the states' power to exact information relating to subversive activity from its employees, established in the *Garner* case, would have become completely illusory.

Conclusion

Despite the evolving uncertainty in this field, certain generalizations can be made. If a state proves, or the individual admits, present membership in the Communist Party or actual participation in illegal activities, there is little doubt of the state's power to impose civil disqualifications.[251] When past membership is involved, the state must restrict its disqualification to situations in which the membership was with knowledge of the illegal purposes of the organization.[252] And even knowing membership will not serve as the basis for disqualification if that membership, since terminated, was a number of years ago during a period when the Communist Party was a lawful and recognized political party in most of the states.[253] The opposite conclusion, permitting a state to disqualify a person on the basis of such remote activities, is thought to have little or no relevance to present fitness and to involve the dangers of a bill of attainder in that it permanently disqualifies, with no opportunity for rehabilitation.[254]

Even more difficult issues arise when the disqualification is not based on any affirmative evidence of past or present subversive activity, but is grounded solely or primarily on a refusal of the individual to supply information relevant to his fitness. The situations that may arise are so varied that generalization is dangerous. But it seems likely that the following factors will be given consideration: the degree of relevance of the questions asked to present fitness; the grounds upon which the refusal to cooperate is based; whether or not the inquiry is made by a state officer and is concerned with the individual's fitness; and, finally, the other evidence relating to fitness contained in the record. Other considerations which may influence decision are the degree of severity of the disqualification sought to be imposed; the extent to which procedural safeguards are provided before the imposition of the disqualification; and the impact of the statutory scheme on first amendment rights.

The emerging constitutional principles seem to be (1) that innocent conduct must be distinguished from guilty conduct; (2) that conduct in the past must be considered not as absolutely disqualifying, but with respect to its relevance to present fitness; (3) that imposition of substantial disqualifications cannot be based on beliefs as distinguished from conduct; and (4) that conscientious refusals to cooperate will be given an uncertain degree of protection.

These principles are an expansion of prior doctrine and evidence a willingness on the part of the Supreme Court to take a more active role in policing state attempts to impose disqualifications on subversives. Yet the development thus far has not crippled or seriously impaired state power. It is to be noted that the Court has avoided resting its decisions on the power of the states to deal with issues of subversion and loyalty. Instead, in addition to interpreting congressional action so as to displace state authority, the Court has used the due process clause of the fourteenth amendment to enforce a strict procedural regularity. The Court also has been notably reluctant to predicate its decisions on first amendment grounds, though free speech considerations have influenced it in many of the cases. If issues of subversion and loyalty continue to be an important sphere of state concern, it is likely that present trends of decision will continue.

FOOTNOTES

[1] Pennsylvania v. Nelson, 350 U. S. 497 (1956).

[2] The development in a number of states is summarized in Gellhorn, The States and Subversion (1952). Information and enlightenment concerning the social and legal implications of widespsread use of security tests for public and private employment are available in a number of books. The best as well as the most recent is Brown, Loyalty and Security (1958). The state legislation as of 1955 is summarized and described in plentiful detail in Fund for the Republic, Digest of the Public Record of Communism in the United States 241-488 (1955) (hereafter cited as "Digest").

[3] *Amicus curiae* brief for the United States at 30, n. 19, Pennsylvania v. Nelson, 350 U. S. 497 (1956).

[4] See Brown, Loyalty and Security, C. 7 (1958).

[5] It should go without saying that any criticism of Supreme Court doctrine or of particular Supreme Court decisions is not meant to reflect on the integrity or ability of the justices or to indicate sympathy with any attacks made upon them. On the contrary, such criticisms as are made here are put forth tentatively and respectfully in the hope that they may appeal to the intelligence of a future day.

[6] 350 U. S. 497 (1956).

[7] For a summary and description of the state sedition statutes existing as of January 1955, see "Digest," op. cit. supra note 2, at 266-306 (1955).

[8] The proposals have been of two kinds. Most of the proposed bills would reverse the Nelson case by providing that the various federal communist control measures "shall not prevent the enforcement in the courts of any State of any statute of such state prescribing any criminal penalty for . . . sedition against such State or the United States . . . " See, e.g., Sen. 2646, 85th Cong., 2d Sess. (1958), which failed of enactment by a close Senate vote. 104 Cong. Rec. 17788 (1958). A statute of this type presents a constitutional question only if sedition against the United States is not within the exclusive powers of the federal government. The present writer's view is that legislative reversal of the Nelson case, whatever one's view of the Court's use in that case of preemption doctrine, would be unwise as a policy matter.

A more drastic type of proposal would establish a general rule of construction against supercession of state laws. See, e.g., Sen. 3143, 84th Cong., 2d Sess. (1956). The Department of Justice has consistently opposed any broad enactment on the unassailable ground that unforeseen effects on numerous federal programs might result. For an analysis of the problems raised by measures of this broader kind, see Wham and Merrill, Federal Pre-emption: How To Protect the States' Jurisdiction, 43 A.B.A.J. 131 (1957).

[9] Useful comments on the general problem of preemption when overlapping criminal statutes are involved are Hunt, Federal Supremacy and State Anti-Subversive Legislation, 53 Mich. L. Rev. 407 (1955); Note, Pre-emption by Federal Criminal Statutes, 55 Col. L. Rev. 83 (1955); Grant, The Scope and Nature of Concurrent Power, 34 Col. L. Rev. 995 (1934).

[10] Commonwealth v. Nelson, 172 Pa. Super. 125, 92 A. 2d 431 (1952).

[11] Commonwealth v. Nelson, 377 Pa. 58, 104 A. 2d 133 (1954).

[12] 350 U. S. 497 (1956). Justices Reed, Burton, and Minton dissented, in an opinion written by Mr. Justice Reed.

[13] 18 U. S. C. §2385 (1952).

[14] C. 1024, 64 Stat. 987 (1950) (codified, as amended, in scattered sections of 8, 18, 22, 50 U. S. C.).

[15] C. 886, 68 Stat. 775 (1954) (codified in scattered sections of 50 U. S. C.).

[16] 350 U. S. 497, 502, quoting from Rice v. Santa Fe Elevator Corp., 331 U. S. 218, 230-31 (1947).

[17] Id., at 504.

[18] Id., at 505.

[19] Id., at 504.

[20] Ibid.

[21] Id., at 509-510.

[22] But cf. Houston v. Moore, 5 Wheat. (U. S.) 1, 22-23 (1820) (invalidating state statute but sustaining state court martial conviction for militiaman's *federal* offense); Prigg v. Pennsylvania, 16 Pet. (U. S.) 539, 617-618, 636 (1842) (invalidating state criminal statute interfering with constitutionally guaranteed right of slaveowner to recapture his fugitive slave); In re Heff, 197 U. S. 488, 506-508 (1905) (invalidating *federal* law which subjected Indian allottees to both federal and state liquor statutes). These cases, each of which contains strong statements in support of the view that enactment of a federal criminal statute automatically supersedes a concurrent state criminal statute, are unsatisfactory as precedents because (1) each was ultimately decided on another ground, and (2) subsequent decisions have ignored them or rejected the dicta contained in them. In re Heff was explicitly overruled by United States v. Nice, 241 U. S. 591 (1916).

[23] The Supreme Court's doctrine of preemption, particularly as applied in commerce clause case, is discussed in Dunham, Congress, the States and Commerce, p. 54 infra; Note, "Occupation of the Field" in Commerce Clause Cases, 1936-1946, 60 Harv. L. Rev. 262 (1946); Note, Supersedure of State Laws by Federal Regulations under the Commerce Clause, 86 U. of Pa. L. Rev. 532 (1938). See also Braden, Umpire to the Federal System, 10 U. of Chi. L. Rev. 27 (1942), and Sholley, The Negative Implications of the Commerce Clause, 3 U. of Chi. L. Rev. 556 (1936).

[24] U. S. Const., Art. 1, §8.

[25] U. S. Const., Art. 1, §8, cls. 11-14.

[26] U. S. Const., Art. 4, §4.

[27] See Gilbert v. Minnesota, 254 U. S. 325, 328-331 (1920).

[28] Barton v. City of Bessemer, 234 Ala. 20, 173 So. 628 (1937); Commonwealth v. Lazar, 103 Pa. Super. 417, 157 Atl. 701 (1931); People v. Lloyd, 304 Ill. 23, 136 N. E. 505 (1922); State v. Hennessy, 114 Wash. 351, 195 Pac. 211 (1921); People v. Steelite, 187 Cal. 361, 203 Pac. 78 (1921); State v. Tachin, 92 N. J. L. 269, 106 Atl. 145 (1919), appeal dismissed, 254 U. S. 662 (1920); State v. Holm, 139 Minn. 267, 166 N. W. 181 (1918); State v. Kahn, 56 Mont. 108, 182 Pac. 107 (1907); People v. Most, 171 N. Y. 423, 64 N. E. 175 (1902); State v. McKee, 73 Conn. 18, 46 Atl. 409 (1900).

[29] 254 U. S. 325 (1920).

[30] 40 Stat. 219 (1917), as amended, 18 U. S. C. §2388 (1952).

[31] 350 U. S. 497, 501. Gilbert had spoken at a public meeting. His remarks were resented and a threat of disorder was thought to be presented. But cf. DeJonge v. Oregon, 299 U. S. 353 (1937).

[32] That a broader ruling was intended is shown by the Court's reliance on the *Gilbert* case in dismissing the appeal of Tachin v. New Jersey, 254 U. S. 662 (1920). The defendants in that case had been convicted of sedition for asserting that the United States had entered World War I for the benefit of certain capitalistic interests. The state court held that the state could punish the acts under its own law even though the offense was directed solely against the United States. "Primarily sedition against the United States is a crime against the federal government, which is the direct subject of attack;

but under our system the federal and state governments are so closely interwoven that an attack on the former may imperil the existence of the latter." State v. Tachin, 92 N. J. L. 269, 271-272, 106 Atl. 145, 147 (1918).

[33] 312 U. S. 52 (1941).

[34] 54 Stat. 673, 8 U. S. C. §451 et seq. (repealed June 27, 1952).

[35] 18 U. S. C. §2385 (1952).

[36] 50 U. S. C. §781 et. seq. (1952).

[37] 50 U. S. C. (1955 Supp.) §841.

[38] Id., at §843.

[39] 336 U. S. 725 (1949).

[40] 12 U. S. C. §§1 - 1831 (1952).

[41] 18 U. S. C. §2113 (1952).

[42] See Jerome v. United States, 318 U. S. 101 (1943); People v. Candelaria, 139 Cal. App. 2d 432, 294 P. 2d 120 (1956); State v. Cioffe, 130 N. J. L. 160, 32 A. 2d 79 (1943); In re Morgan, 80 F. Supp. 810 (D. Iowa, 1948).

[43] 350 U. S. 497, 518.

[44] 312 U. S. 52 (1941).

[45] Preemption cases may be divided into three general classes, each of which has been accorded somewhat different treatment because of the differing policy considerations that are applicable. (1) Where federal and state statutes are in *conflict* in the sense that compliance with one necessarily constitutes violation of the other. (2) Where a state pattern of regulation *deviates* from the federal pattern, without directly conflicting. The state regulation may differ in that it imposes an additional requirement on the same matter, *or* in that it closes a gap in the federal scheme by regulating a closely related matter. (3) Where federal and state statutes *coincide* by requiring or forbidding exactly or substantially the same thing. A similar classification is suggested in Sholley, Cases on Constitutional Law 946-47 (1951). For a more detailed discussion of the various kinds of preemption cases, and the differing problems they present, see text at notes 121 - 133, *infra*.

[46] 50 U. S. C. §783 (1952).

[47] Id., at §§781, 782, 786 - 793 (1952).

[48] Id., at §794 (1952).

[49] Id., at §§782, 784, 786, 789, 790, 791, 792a, 793, 841 - 857 (1955 Supp.)

[50] The Pennsylvania Supreme Court considered only the effect of the Smith Act. 377 Pa. 58, 104 A. 2d 133. Although the Supreme Court stated that the question for decision was whether the Smith Act "supersedes the enforceability of the Pennsylvania Sedition Act which proscribes the same conduct," 350 U. S. 497, 499, the Court considered the case as involving the impact of *all* federal communist control measures on state power, not only the Smith Act.

[51] Fox v. Ohio, 5 How. (U. S.) 410 (1847); United States v. Marigold, 9 How. (U. S.) 560, 569 (1850); Moore v. Illinois, 14 How. (U. S.) 13, 19-20 (1852); Ex parte Siebold, 100 U. S. 371, 389-391 (1879); Gilbert v. Minnesota, 254 U. S. 325, 329-330 (1920); United States v. Lanza, 260 U. S. 377, 382 (1922); California v. Zook, 336 U. S. 725, 731 (1949).

[52] See, *e.g.*, Gitlow v. New York, 268 U. S. 652, 668 (1925); Whitney v. California, 274 U. S. 357 (1927).

[53] 350 U. S. 497, 508.

[54] Id., at 498 n. 2.

[55] Id., at 507.

[56] Id., at 509-10.

[57] Mr. Justice Story in Houston v. Moore, 5 Wheat. (U. S.) 1, 72 (1820) (dissenting opinion).

[58] Hebert v. Louisiana, 272 U. S. 312 (1926).

[59] United States v. Lanza, 260 U. S. 377 (1922).

[60] Feldman v. United States, 322 U. S. 487 (1944).

[61] Weeks v. United States, 232 U. S. 383 (1914). Cf. Gambino v. United States, 275 U. S. 310 (1927).

[62] United States v. Coolidge, 1 Wheat. (U. S.) 415 (1816); United States v. Hudson & Goodwin, 7 Cranch (U. S.) 32 (1812). But cf. 2 Crosskey, Politics and the Constitution 764-84 (1953).

[63] See Hart and Wechsler, The Federal Courts and the Federal System 1090-95 (1953).

[64] See Schwartz, Federal Criminal Jurisdiction and Prosecutors' Discretion, 13 Law & Contemp. Prob. 64 (1948), where the development of federal criminal jurisdiction is traced.

[65] Two reconstruction era measures anticipated the later development. Civil Rights Acts of 1866, 14 Stat. 27, and 1870, 16 Stat. 140, 144; Post Office Code of 1872 (mail fraud, lottery by mail), 17 Stat. 283, 302, 323.

[66] Cf. Schwartz, op. cit. supra note 64, at 73.

[67] United States v. Amy, 24 Fed. Cas. 792, No. 14,445 (C. C. Va., 1859), is the leading case (dictum of Mr. Chief Justice Taney). See also Quinn v. State, 95 So. 2d 273 (Ala. App., 1957); Ex parte Groom, 87 Mont. 377, 381-382, 287 Pac. 638, 639 (1930); In re Van Dyke, 276 Mich. 32, 267 N. W. 778 (1936); Commonwealth v. Ponzi, 256 Mass. 159, 152 N. E. 307 (1926); State v. Stevens, 60 Mont. 390, 199 Pac. 256 (1921); State v. Feree, 88 W. Va. 434, 437, 107 S. E. 126, 127 (1921); People v. Burke, 161 Mich. 397, 126 N. W. 446 (1910); Hayner v. State, 83 Ohio 178, 93 N. E. 900 (1910); State v. Moore, 143 Iowa 240, 241-242, 121 N. W. 1052, 1053 (1905); State v. Morrow, 40 S. C. 221, 18 S. E. 853 (1893).

[68] See cases cited note 51, supra.

[69] See text accompanying notes 77-92, infra.

[70] Several federal criminal statutes contain a clause providing that a state conviction or acquittal shall act as a plea in bar in the federal court. See 18 U. S. C. §659 (1952) (embezzlement or theft of baggage from interstate commerce); 18 U. S. C. §660 (1952) (embezzlement of funds of interstate carriers); 18 U. S. C. §1992 (1952) (wrecking of trains); 18 U. S. C. §2117 (1952) (breaking into interstate carrier with intent to steal).

[71] Cf. Schwartz, op. cit. supra note 64, at 71-73.

[72] Hines v. Davidowitz, 312 U. S. 52 (1941); Houston v. Moore, 5 Wheat. (U. S. 1, 31 (1820). Cf. Zook v. California, 336 U. S. 725, 740, 752 (1949) (dissenting opinion).

[73] United States v. Lanza, 260 U. S. 377 (1922). In Puerto Rico v. Shell Co., 302 U. S. 253 (1937), it was held that the double jeopardy clause barred double prosecution for the same conduct by the United States and its subordinate government in a territory. In Jerome v. United States, 318 U. S. 101, 105 (1943), possible double punishment was given as a reason for narrow construction of a federal criminal statute. In the *Nelson* case the Court was careful to say that "we do not reach the question whether double or multiple punishment for the same overt acts . . . has constitutional sanction," citing an article which severely criticizes the *Lanza rule*. 350 U. S. 497, 509.

[74] Bartkus v. Illinois, No. 1, October Term, 1958. See People v. Bartkus, 7 Ill. 2d 134, 130 N. E. 2d 187 (1955), cert. granted, 352 U. S. 907 (1956), aff'd by an equally divided court, 355 U. S. 281 (1958) (Mr. Justice Brennan not participating), judgment vacated and case restored for reargument, 356 U. S. 969 (1958).

[75] Abbate v. United States, No. 7, October Term, 1958. See

247 F. 2d 410 (C. A. 5, 1957), cert. granted, 355 U. S. 902.
[78] If the state statute expresses a separate and distinct state interest, it is arguable that the state is free to enforce its own law without regard to federal action. See Fox v. Ohio, 5 How. (U. S.) 410 (1847); United States v. Cruikshank, 92 U. S. 542, 550-551 (1875); Ex parte Siebold, 100 U. S. 371, 393 (1879); Screws v. United States, 325 U. S. 91 (1945).
[77] 350 U. S. 497, 501 n. 10.
[78] 18 U. S. C. §3231 (1952).
[79] 350 U. S. 497, 501 n. 10.
[80] Without this provision it would not have been certain that state courts could not punish for federal offenses. See Houston v. Moore, 5 Wheat. (U. S.) 1 (1820) (sustaining state court martial conviction for militiaman's federal offense; state can prosecute federal offenses when Congress has not given exclusive jurisdiction to the federal courts). See also Tennessee v. Davis, 100 U. S. 257 (1880) (sustaining removal of state criminal prosecution of federal revenue officer to federal court); Testa v. Katt, 330 U. S. 386 (1947) (requiring state to entertain wartime price control treble-damage action even though a "penal" law). See Note, Utilization of State Courts to Enforce Federal Penal and Criminal Statutes, 60 Harv. L. Rev. 966 (1947).
[81] 1 Stat. 73 (1789).
[82] 2 Stat. 404 (1806); 2 Stat. 423 (1807).
[83] 4 Stat. 122, §26 (1825).
[84] Rev. Stat. §5328 (1878).
[85] 35 Stat. 1151 (1909).
[86] See reviser's note to 18 U. S. C. §3231.
[87] Ibid.
[88] 189 U. S. 319 (1903). See also In re Dixon, 41 Cal. 2d 756, 264, P. 2d 513 (1953) (counterfeiting); State v. Duncan, 221 Ark. 681, 255 S. W. 2d 430 (1953) (fraudulent sale of mortgaged property); Natasi v. Aderhold, 201 Ga. 237, 39 S. E. 2d 403 (1946) (counterfeiting); People v. Welch, 141 N. Y. 266, 36 N. E. 328 (1894) (manslaughter by officer of vessel).
[89] 189 U. S. 319, 323.
[90] Id. at 324-25.
[91] 18 U. S. C. §2385 (1952).
[92] 350 U. S. 497, 519.
[93] Commonwealth v. Gilbert, 334 Mass. 71, 134 N. E. 2d 13 (1956); Braden v. Commonwealth, 291 S. W. 2d 843 (Ky., 1956).
[94] 18 U. S. C. §2385 (1952).
[95] 50 U. S. C. (1955 Supp.) §841.
[96] 350 U. S. 497, 500.
[97] 5 How. (U. S.) 410 (1847).
[98] 9 How. (U. S.) 559 (1850).
[99] In re Dixon, 41 Cal. 2d 756, 264 P. 2d 513 (1953); Natasi v. Aderhold, 201 Ga. 237, 39 S. E. 2d 403 (1946); People v. McDonnell, 80 Cal. 285 (1889) 22 Pac. 190; Ex parte Geisler, 50 Fed. 411 (C. C. Tex. 1883); In re Truman, 44 Mo. 181 (1869); State v. Moore, 6 Ind. 436 (1855); State v. Mix, 15 Mo. 153 (1851).

Prior to Fox v. Ohio, 5 How. (U. S.) 410 (1847), the state courts had uniformly reached the same conclusion in reliance on the savings clause appended to federal counterfeiting statutes. See e.g., Commonwealth v. Fuller, 49 Mass. 313 (1844); Chess v. State, 1 Blackf. (Ind.) 198 (1822); State v. Antonio, 3 Brev. (S. C.) 562 (1816).
[100] Cases cited note 42, supra. Cf. People v. Bartkus, 7 Ill. 2d 138, 130 N. E. 2d 187 (1955), aff'd by an equally divided court, 355 U. S. 281 (1958), set down for reargument, 356 U. S. 969 (1958), in which no preemption question was suggested.
[101] See Brooke v. State, 155 Ala. 78, 46 So. 491 (1908) (assault and battery in post office).
[102] Quinn v. State, 95 So. 2d 273 (Ala. App., 1957). For cases preceding the *Nelson* decision, see note 67, supra.
[103] Preemption arguments based on the *Nelson* case have been rejected in the following cases: Guerin v. State, 315 P. 2d 965 (Nev., 1957) (narcotics); People v. Knapp, 157 N. Y. S. 2d 820 (Gen. Sess. 1956) (labor extortion); People v. Bianchi, 3 N. Y. Misc. 2d 696, 155 N. Y. S. 2d 703 (Nassau Co. Ct., 1956) (excessive motorboat speed).
[104] 13 Ill. 2d 68, 147 N. E. 2d 327 (1958).
[105] Id. at 72 and 329.
[106] Ibid.
[107] Texas, Alabama, Louisiana, and Michigan. The statutes are described in Digest 383-402 (1955).
[108] Arkansas, Delaware and New Mexico.
[109] 52 Stat. 631 (1938), as amended, 22 U. S. C. §611 et seq. (1952).
[110] 18 U. S. C. §2386 (1952).
[111] California, Connecticut, Florida, Iowa, Louisiana, Maine, Montana, New Hampshire, New York and South Carolina. Alien registration statutes in Pennsylvania and Michigan have been invalidated. Hines v. Davidowitz, 312 U. S. 52 (1941) (Pennsylvania); Arrowsmith v. Voorhies, 55 F. 2d 310 (E. D. Mich. 1931) (Michigan).
[112] 312 U. S. 52 (1941).
[113] It should be noted that the Department of Justice, which opposed a finding of preemption with respect to state sedition statutes, has indicated that state communist control measures were governed by different considerations and were probably invalid. *Amicus curiae* brief for the United States at 38, n. 24, Pennsylvania v. Nelson, 350 U. S. 497 (1956).
[114] 345 Mich. 519, 77 N. W. 2d 104 (1956). Prior to the *Nelson* case, a divided three-judge federal district court had upheld the same statute. Albertson v. Millard, 106 F. Supp. 635 (E. D. Mich. 1952), vacated on other ground, 345 U. S. 242 (1953). See also Knox v. State, 38 Ala. App. 484, 87 So. 2d 672 (1956), where the question of the validity of Alabama registration provisions was not reached.
[115] See "Digest," op. cit. supra note 2, at 324-82, 410-34.
[116] State v. Diez, 97 So. 2d 105 (Fla., 1957). See also First Unitarian Church v. County of Los Angeles, 48 Cal. 2d 419, 441, 311 P. 2d 508, 522 (1957), rev'd on due process ground without reaching question of preemption, 357 U. S. 545 (1958) (denial of tax exemption to organization declining to file a declaration that it does not advocate forceful overthrow of government).
[117] Cf. Oklahoma v. United States Civil Service Comm'n, 330 U. S. 127 (1947).
[118] 18 U. S. C. §842 (1955 Supp.)
[119] 354 U. S. 234 (1957).
[120] State power to conduct legislative investigations of subversive activities has been sustained against a preemption argument in Kahn v. Wyman, 100 N. H. 245, 123 A. 2d 166 (1956), and Wyman v. Uphaus, 100 N. H. 436, 440, 130 A. 2d 278, 282 (1957). The petitioner in the *Sweezy* case made a preemption argument in the Supreme Court, but the Court was able to dispose of the case without reaching the question.
[121] U. S. Const., Art. I, §8, cls. 11-16; Art. I, §10, cl. 3.
[122] In People v. Lynch, 11 Johns. (N. Y.) 549 (1814), and in Ex parte Quarrier, 2 W. Va. 569 (1866), charges of treason were found improperly laid against a state, where the accused

was deemed to have acted rather against his allegiance to the United States. Professor Hurst in his study of Treason in the United States, 58 Harv. L. Rev. 226, 395, 806 (1945), states at p. 806 that "[t]he trials of Thomas Dorr, and of John Brown, for treason by levying war against the states of Rhode Island and Virginia, respectively, are the only completed treason prosecutions by state authorities."

[123] Mr. Justice Brandeis argued unsuccessfully in his dissenting opinion in Gilbert v. Minnesota, 254 U. S. 325, 334-43 (1920), that penalties for interference with federal recruitment were within the exclusive power of the federal government.

[124] 222 U. S. 424 (1912).

[125] E.g., Union Brokerage Co. v. Jensen, 322 U. S. 202 (1944) (state statute requiring license of foreign corporations held valid as applied to customhouse brokers licensed under a federal statute); Hines v. Davidowitz, 312 U. S. 52 (1941) (State alien registration statute requiring aliens to carry identification cards held superseded by federal registration statute not containing a similar provision); Savage v. Jones, 225 U. S. 501 (1912) (state statute requiring a more descriptive labelling of a product than was required by Federal Pure Food and Drug Act held valid).

[126] Cloverleaf Butter Co. v. Patterson, 315 U. S. 148 (1942) (a state inspection system of the *ingredients* used in making renovated butter, with power of condemnation, held superseded by a federal statute authorizing factory inspection and condemnation of unfit *products*); Kelly v. Washington ex rel. Foss Co., 302 U. S. 1 (1937) (state inspection law as applied to motor tugs which were not covered by federal inspection laws applicable to practically all other vessels held valid).

[127] California v. Zook, 336 U. S. 725 (1949).

[128] Mintz v. Baldwin, 289 U. S. 346 (1933); Asbell v. Kansas, 209 U. S. 251 (1908).

[129] Jerome v. United States, 318 U. S. 101 (1943).

[130] Pennsylvania v. Nelson, 350 U. S. 497 (1956), and Parker v. Brown, 317 U. S. 341 (1943), illustrate this tendency.

[131] California v. Zook, 336 U. S. 725 (1949); Hoke v. United States, 227 U. S. 308 (1913); Ex parte Siebold, 100 U. S. 371 (1879).

[132] Cases cited note 51, supra.

[133] See Meltzer, The Supreme Court, the Congress and State Jurisdiction Over Labor Relations, p. 95, infra.

[134] Among the more common "tests" are the following: (1) *The Conflict Test* " . . . in the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together. . . . " Sinnot v. Davenport, 22 How. (U. S.) 227, 243 (1859). (2) *The Coincidence Test*—"When Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition. . . . " Charleston & W. C. Ry. Co. v. Varnville Furniture Co., 237 U. S. 597, 604 (1915). (3) *The Dominance Test*— " . . . the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Rice v. Santa Fe Elevator Corp., 331 U. S. 218, 230 (1947). (4) *The Pervasiveness Test*—"The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." Rice v. Santa Fe Elevator Corp., supra. (5) *The Conflict in Administration Test*—" . . . enforcement of [the state law] presents a serious danger of conflict with the administration of the federal program." Pennsylvania v. Nelson, 350 U. S. 497, 505 (1956).

[135] The conflict test is often stated as the exclusive test when state regulation is upheld. E.g., Townsend v. Yeomans, 301 U. S. 441 (1937).

[136] E.g., Pennsylvania v. Nelson, 350 U. S. 497 (1956); Rice v. Santa Fe Elevator Corp., 331 U. S. 218 (1947).

[137] Powell, Supreme Court Decisions on the Commerce Clause and State Police Power, 1910-1914 II, 22 Col. L. Rev. 28, 48 (1922).

[138] 354 U. S. 234 (1957).

[139] 354 U. S. 178 (1957).

[140] See e.g., Aiuppa v. United States, 201 F. 2d 287 (C. A. 6th, 1952); United States v. Costello, 198 F. 2d 200 (C. A. 2d, 1952), cert. den., 344 U. S. 874 (1952).

[141] Bart v. United States, 349 U. S. 219 (1955); Emspak v. United States, 349 U. S. 190 (1955); Quinn v. United States, 349 U. S. 155 (1955).

[142] A witness claiming the privilege was originally required to show that his answers might disclose a material element of a crime. 8 Wigmore Evidence §§2260-61 (3d ed. 1940). This rule was ameliorated by Counselman v. Hitchcock, 142 U. S. 547 (1892), which held that a witness is privileged not to answer even a seemingly harmless question if the answer to that question would enable a prosecutor to discover incriminating evidence or otherwise tend to prove the commission of a crime. But until the last few years the witness was required to show that the apprehended danger was " 'real and appreciable . . . in the ordinary course of things' " and not so " 'improbable that no reasonable man would suffer it to influence his conduct.' " Mason v. United States, 244 U. S. 362, 365-66 (1917). The *Mason* case has been quietly laid to rest by Hoffman v. United States, 341 U. S. 479 (1951), and a series of *per curiam* reversals of lower federal court decisions which followed the *Mason* test. Trock v. United States, 351 U. S. 976 (1956); Singleton v. United States, 343 U. S. 944 (1952); Greenberg v. United States, 343 U. S. 918 (1952). Present law upholds the claim of the privilege if the witness can show any imaginable connection, not wholly incredible, between a possible answer to a question and a crime. The limits of human imagination being what they are, the result is that a witness willing to claim the privilege can rarely be compelled to answer.

See generally Note, The Privilege Against Self-Incrimination in the Federal Courts, 70 Harv. L. Rev. 1454, 1455-58 (1957).

[143] See text accompanying notes 231-50, infra.

[144] See United States v. Groves, 18 F. Supp. 3, 4 (W. D. Pa., 1937). Cf. Boyd v. United States, 116 U. S. 616, 634-35 (1886); FTC. v American Tobacco Co., 264 U. S. 298, 305-306 (1924).

[145] Consult Note, The Power of Congress to Investigate and to Compel Testimony, 70 Harv. L. Rev. 671, 673-674 (1957).

[146] See e.g., Barsky v. United States, 167 F. 2d 241, 254 (C. A. D. C., 1948) (dissenting opinion). Consult Comment, Legislative Inquiry Into Political Activity: First Amendment Immunity From Committee Interrogation, 65 Yale L. J. 1159 (1956).

[147] See e.g., Lawson v. United States, 176 F. 2d 49 (C. A. D. C., 1949), cert. den., 339 U. S. 934 (1950); Barsky v. United States, 167 F. 2d 241 (C. A. D. C., 1948), cert. den., 334 U. S. 843 (1948); United States v. Josephson, 165 F. 2d 82 (C. A. 2d, 1947), cert. den., 334 U. S. 843 (1948).

[148] Kilbourn v. Thompson, 103 U. S. 168, 194-195 (1881). But a proper legislative purpose is presumed if the matter under inquiry is one with respect to which Congress might validly legislate. McGrain v. Daugherty, 273 U. S. 135, 177-178

(1927); United States v. Orman, 207 F. 2d 148 (C. A. 3d, 1953).

[149] See e.g., United States v. Orman, 207 F. 2d 148 (C. A. 3, 1953); Rumely v. United States, 197 F. 2d 166 (C. A. D. C., 1952), aff'd, 345 U. S. 41 (1953); United States v. Kamin, 136 F. Supp. 791, 801-804 (D. Mass., 1956).

[150] See United States v. Orman, 207 F. 2d 148 (C. A. 3, 1953); Bowers v. United States, 202 F. 2d 447 (C. A. D. C., 1953); Marshall v. United States, 176 F. 2d 473 (C. A. D. C., 1949), cert. den., 339 U. S. 933 (1950).

[151] See e.g., United States v. Lamont, 236 F. 2d 312 (C. A. 2d, 1956) (indictment must allege authorization of legislative committee to conduct investigation in question); United States v. Kamin, 136 F. Supp. 791 (D. Mass., 1956) (narrow construction of congressional authorization).

[152] The contempt of Congress statute makes it a misdemeanor for any person "who having been summoned as a witness by the authority of either House of Congress . . . refuses to answer any question pertinent to the question under inquiry . . . . " Rev. Stat. §102 (1878); as amended, 2 U. S. C. §192 (1952).

[153] 354 U. S. 178 (1957). The *Watkins* case is discussed in the following articles and notes, among others: Fleischmann, Watkins v. United States and Congressional Power of Investigation, 9 Hast. L. J. 145 ((1958); Note, The Supreme Court, 1956 Term, 71 Harv. L. Rev. 141-146 (1957); Comment, Congress v. The Courts: Limitations on Congressional Investigation, 24 U. of Chi. L. Rev. 740 (1957); Note, 56 Mich. L. Rev. 272 (1957).

[154] Watkins said: " . . . I am not going to plead the fifth amendment, but I refuse to answer certain questions that I believe are outside the proper scope of your committee's activities. I will answer any questions which this committee puts to me about myself. I will also answer questions about those persons whom I knew to be members of the Communist Party and whom I believe still are. I will not, however, answer any questions with respect to others with whom I associated in the past. . . ." 354 U. S. 178, 185.

[155] Watkins v. United States, 233 F. 2d 681 (C. A. D. C., 1956).

[156] 354 U. S. 178 (1957). The Chief Justice wrote for the majority of six. Mr. Justice Frankfurter joined the opinion of the Court, but also filed a supplemental concurring opinion stressing the narrow grounds of decision. Mr. Justice Clark was the lone dissenter, and Justices Burton and Whittaker did not participate.

[157] 354 U. S. 178, 216-217 (concurring opinion).

[158] H. R. Res. No. 5, 83rd Cong., 1st Sess., 99 Cong. Rec. 15, 18, (1953).

[159] I am satisfied from a reading of the record that Watkins was not laboring under any misapprehension concerning the nature of the inquiry—it was part of a continuing investigation of Communist infiltration of important labor unions. See the dissenting opinion of Mr. Justice Clark, 354 U. S. 178, 225-227.

[160] The Court's emphasis on the use of the statutory contempt procedure raises the question whether Congress could circumvent the holding by returning to the older practice of direct contempt of Congress. A person committed by action of Congress itself can test the legality of his detention in a habeas corpus proceeding. Kilbourn v. Thompson, 103 U. S. 168 (1881). And pertinency of the questions to a valid legislative inquiry would appear to be a constitutional issue open on habeas corpus. Any attempt by Congress to overrule the *Watkins* case is likely to raise serious constitutional questions.

[161] See United States v. Harriss, 347 U. S. 612 (1954); United States v. Cardiff, 344 U. S. 174 (1952); Winters v. New York, 333 U. S. 507 (1948); Musser v. Utah, 333 U. S. 95 (1948); Lanzetta v. New Jersey, 306 U. S. 451 (1939).

[162] 354 U. S. 178, 200-206.

[163] Id. at 200.

[164] 103 U. S. 168 (1881).

[165] In United States v. Rumely, 345 U. S. 41, 46 (1953), the Court spoke of "the loose language of *Kilbourne* v. *Thompson*" and "the inroads that have been made upon that case by later cases." See also, McGrain v. Daugherty, 273 U. S. 135, 177-80 (1927); United States v. Orman, 207 F. 2d 148 (C. A. 3d, 1953).

[166] 354 U. S. 178, 200.

[167] Id. at 197. Under this view the "law" abridging speech is the prospective legislation which the investigation may precede. It would seem more plausible to regard the congressional resolution as a "law" for the purposes of the first amendment.

[168] 354 U. S. 178, 197.

[169] Id. at 205.

[170] Consult Driver, Constitutional Limitations on the Power of Congress To Punish Contempts of Its Investigating Committees, 38 Va. L. Rev. 887, 1011 (1952); Note, The Power of Congress To Investigate and To Compel Testimony, 70 Harv. L. Rev. 671 (1957); Note, Constitutional Limitations on the Un-American Activities Committee, 47 Colum. L. Rev. 416 (1947).

[171] The following state cases deal with legislative power to compel testimony: State v. Morgan, 167 Ohio St. 295, 147 N. E. 2d 847 (1958); Wyman v. Uphaus, 100 N. H. 436, 130 A. 2d 278 (1957), aff'd after reargument, 101 N. H. 139, 136 A. 2d 221 (1957); Kahn v. Wyman, 100 N. H. 245, 123 A. 2d 166 (1956); Opinion of the Justices, 331 Mass. 764, 119 N. E. 2d 385 (1954); Daniman v. Board of Education of New York, 306 N. Y. 532, 119 N. E. 2d 373 (1954); Matson v. Jackson, 368 Pa. 283, 83 A. 2d 134 (1951); Fawick Airflex Co. v. United Electrical Workers, Local 735, 56 Ohio Abst. 419, 92 N. E. 2d 431 (Ct. of App. Cuyahoga, 1950), appeal diss'd, 154 Ohio St. 206, 93 N. E. 2d 480 (1950); State ex rel. Benemovsky v. Sullivan, 37 So. 2d 907 (Fla., 1948); State v. James, 36 Wash. 2d 882, 221 P. 2d 482 (1950), cert. den., 341 U. S. 911 (1950); State ex rel. Robinson v. Fluent, 30 Wash. 2d 194, 191 P. 2d 241 (1948), cert. den., 335 U. S. 844 (1948); Ex parte Coon, 44 Cal. App. 2d 531, 112 P. 2d 767 (1941); In re Joint Legislative Committee, 285 N. Y. 1, 32 N. E. 2d 769 (1941); Smith v. Kern, 285 N. Y. 632, 33 N. E. 2d 556 (1941); In re Martens, 109 Misc. 492, 180 N. Y. S. 171 (Sup. Ct. 1919).

[172] Cantwell v. Connecticut, 310 U. S. 296 (1940); Gitlow v. New York, 268 U. S. 652 (1925).

[173] See Rochin v. California, 338 U. S. 49 (1949); Adamson v. California, 332 U. S. 46 (1947).

[174] A recent illustration of this is Knapp v. Schweitzer, 357 U. S. 371 (1958). Knapp was convicted of contempt in a state court when he refused to testify after being granted immunity from state prosecution. He argued that his answers might tend to incriminate him under federal law. The Supreme Court affirmed the conviction, holding that it was not a denial of due process for the state to compel Knapp, over his objection, to testify as to matters which might incriminate him under federal law, at least where there was no showing that federal officers had induced or participated in the testimonial compulsion. This conclusion follows logically from the prior authorities. Indeed, the three dissenting justices did not quarrel with the conclusion but only with the disposition— they felt that the state court had decided the case under a misapprehension of fed-

eral law and that it should be remanded to it for reconsideration in the light of a correct interpretation of federal law. The problem involved in the *Knapp* case appears to have been created by Feidman v. United States, 322 U. S. 487 (1944), in which the Court held, 4-3, that evidence obtained by state authorities under testimonial compulsion was admissible in a federal criminal prosecution. Four members of the present Court have now asked for a reconsideration of the *Feldman* case. See 357 U. S. 371, 381-385. See also State v. Morgan, 167 Ohio St. 295, 147 N.E. 2d 847 (1958) reaff'g, 164 Ohio St. 529, 133 N.E. 2d 104 (1956); Wyman v. DeGregory, 100 N.H. 163, 121 A. 2d 805.

[175] 354 U. S. 234 (1957).

[176] N.H. Rev. Stat. Ann. §588.1-16 (1955).

[177] N.H. Laws 1953, c. 307. See Nelson v. Wyman, 99 N.H. 33, 105 A. 2d 756 (1954).

[178] No question with respect to a state's power to investigate activities at a state-supported university was presented, since the New Hampshire Supreme Court had held that this purpose was not within the authority conferred on the attorney general. Hence the questions relating to the lecture could only be upheld as they related to Sweezy as a possible "subversive person."

[179] Wyman v. Sweezy, 100 N.H. 103, 121 A. 2d 783 (1956).

[180] 354 U.S. 234 (1957). Mr. Justice Frankfurter, with whom Mr. Justice Harlan joined, concurred in the result, but on another ground. Mr. Justice Clark dissented in an opinion which Mr. Justice Burton joined. Mr. Justice Whittaker did not participate.

[181] Id. at 247.

[182] Id. at 249-52.

[183] Id. at 253 (emphasis added).

[184] See, e.g., Dreyer v. Illinois, 187 U. S. 71, 84 (1902). But cf. Tenney v. Brandhove, 341 U. S. 367, 378 (1951) (dictum).

[185] 354 U. S. 234, 260-67.

[186] Id. at 270.

[187] Id. at 255.

[188] E.g., Brewster v. United States, 255 F. 2d 899 (C.A. D.C., 1958) (authorization of Senate Committee on Government Operations not sufficiently clear to compel labor union official to testify concerning misuse of union funds).

[189] The crucial question left unsettled is whether vagueness or breadth of an authorizing resolution is itself bad. If so, *Watkins* will have a considerable impact on the organization of investigating committees. Standing committees with broad authorizations and settled jurisdiction might be precluded from conducting investigations requiring use of the subpoena power. This would force Congress to create *ad hoc* committees for the purpose of conducting particular investigations.

A bare majority of the Court of Appeals for the District of Columbia Circuit, sitting *en banc*, in a series of cases remanded to it for reconsideration in the light of *Watkins* has adopted the position that a clarification at the hearing by the committee chairman of the nature and scope of the inquiry satisfies the due process requirements laid down in *Watkins*. Barenblatt v. United States, 240 F. 2d 875 (C.A. D.C., 1957), judgment vacated and case remanded for reconsideration, 354 U. S. 930 (1957), affirmed after reconsideration, 252 F. 2d 129 (1958), cert. granted, 356 U. S. 929 (1958) (No. 35, October Term, 1958); Flaxer v. United States, 235 F. 2d 821 (C.A. D.C., 1956), judgment vacated and case remanded for reconsideration, 354 U. S. 929 (1957), affirmed after reconsideration, 258 F. 2d 413 (1958), cert. granted, 357 U. S. 904 (1958) (No. 60, October Term, 1958). It would seem that the Court of Appeals gave a correct interpretation to the *Watkins* decision. In any event, the issue is back in the hands of the Court. It may not be reached in either case, however, because of the presence of other questions which may prove decisive.

[190] See the discussion of the effect of the *Nelson* case on legislative investigations, supra at notes 119-20.

[191] 354 U. S. 234, 251.

[192] Uphaus v. Wyman, 100 N.H. 440, 130 A. 2d 278 (1957), judgment vacated and remanded for reconsideration, 355 U. S. 16 (1957), reaffirmed after reargument, 101 N.H. 139, 136 A. 2d 221 (1957), prob. juris. noted, 356 U. S. 926 (1958).

Uphaus, the director of a New Hampshire resort center, refused to produce guest registrations and correspondence relating to speakers and discussion leaders. He was convicted of contempt under the same New Hampshire statutes involved in the *Sweezy* case. New Hampshire having given affirmative indications that it wants the information, the first amendment question will be difficult to escape.

[193] A thorough and excellent treatment of the entire subject is Brown, Loyalty and Security (1958).

[194] Hawker v. New York, 129 U. S. 114 (1898); Dent v. West Virginia, 129 U. S. 114 (1889).

[195] Douglas v. Noble, 261 U. S. 165 (1923); Dent v. West Virginia, 129 U. S. 114 (1889); Cummings v. Missouri, 4 Wall. (U. S.) 277, 319-320 (1867).

[196] Cf. Yick Wo v. Hopkins, 118 U. S. 356 (1886).

[197] 341 U. S. 716 (1951).

[198] Id. at 719.

[199] Garner v. Board of Public Works, 98 Cal. App. 2d 493, 220 P. 2d 958 (Dist. Ct. App. 1950).

[200] 341 U. S. 716 (1951).

[201] Only Justices Black and Douglas dissented with respect to the affidavit. They thought the case in all its aspects was controlled by Cummings v. Missouri, 4 Wall. (U. S.) 277 (1867), and Ex parte Garland, 4 Wall. (U. S.) 333 (1867), in which test oaths directed against adherents of the confederate cause were struck down as bills of attainder and ex post facto laws.

[202] 341 U. S. 716, 725 (concurring opinion).

[203] Id. at 720, 730.

[204] In addition to Justices Black and Douglas, Justices Frankfurter and Burton dissented to this portion of the case.

[205] Id. at 722.

[206] Id. at 725 (concurring opinion).

[207] 341 U. S. 56 (1951).

[208] 342 U. S. 485 (1952).

[209] Persons employed or seeking employment in the public schools "have no right to work for the State in the school system on their own terms . . . They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere." Id. at 492.

Cf. Schware v. Board of Bar Examiners, 353 U. S. 232, 238-239 (1957); Wieman v. Updegraff, 344 U. S. 183, 191-192 (1952).

[210] Adler v. Board of Education, 342 U. S. 485, 494 (1952); Garner v. Board of Public Works, 341 U. S. 716, 723-724 (1951); Gerende v. Board of Supervisors, 341 U. S. 56-57 (1951).

[211] 344 U. S. 183 (1952).

[212] Id. at 191.

[213] Sweezy v. New Hampshire, 354 U. S. 234 (1957).

[214] 353 U. S. 232 (1957).

[215] Cf., e.g., Adams v. Tanner, 244 U. S. 590 (1917) (invalidating state law absolutely prohibiting private employment agencies), with Brazee v. Michigan, 241 U. S. 340 (1916) (upholding state law imposing license fees on private employ-

ment agencies and prohibiting them from sending applicants to an employer who had not applied for labor).

[216] Allgeyer v. Louisiana, 165 U. S. 578, 589 (1897).

[217] Hawker v. New York, 170 U. S. 189 (1898) (upholding, 6-3, a state law excluding persons convicted of a felony from the practice of medicine); Dent v. West Virginia, 129 U. S. 114 (1889) (upholding a state law restricting the practice of medicine to those satisfying state board of their qualifications).

[218] See, e.g., Williamson v. Lee Optical Co. of Oklahoma, 348 U. S. 483 (1955). In upholding an Oklahoma statute which (1) made it unlawful for any person not a licensed optometrist or ophthalmologist to fit lenses to the face or to duplicate or replace lenses, except upon the written prescription of an Oklahoma-licensed optometrist or ophthamologist; (2) subjected opticians to this regulatory system while exempting all sellers of ready-to-wear glasses; (3) forbad the use of the premises of retail stores by opticians; and (4) prohibited all advertising, the Court said: "The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature not the courts, to balance the advantages and disadvantages of the new requirement . . . . The law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." 348 U. S. 483, 487-88.

[219] E.g., Hardware Dealers Mutual Fire Ins. Co. v. Glidden, 284 U. S. 151, 158-59 (1931): Since the legislation "deals with a subject within the scope of the legislative power, the presumption of constitutionality is to be indulged . . . . We cannot assume that the Minnesota legislature did not have knowledge of conditions supporting its judgment that the legislation was in the public interest, and it is enough that, when the statute is read in the light of circumstances generally known to attend the recovery of fire insurance losses, the possibility of a rational basis for the legislative judgment is not excluded."

[220] E.g., Kotch v. Pilot Commissioners, 330 U. S. 552 (1947) (upholding, 5-4, a Louisiana river pilotage law under which incumbent pilots had an unfettered discretion to select their successors, a discretion actually exercised by choosing friends and relatives of the pilots); Daniel v. Family Security Life Ins. Co., 336 U. S. 220 (1949) (upholding a state statute forbidding life insurance companies and their agents from operating an undertaking business and forbidding undertakers from serving as life insurance agents; only one insurance company in the state operated on the basis of using undertakers as its agents).

[221] 353 U. S. 232 (1957).

[222] 60 N.M. 304, 291 P. 2d 607 (1955).

[223] 353 U. S. 232. Mr. Justice Whittaker did not participate.

[224] Wieman v. Updegraff, 344 U. S. 183 (1952).

[225] See, generally, Gellhorn, Individual Freedom and Governmental Restraints, C. 3 (1956).

[226] See, e.g., Norris v. Alabama, 294 U. S. 587 (1935); Chambers v. Florida, 309 U. S. 227 (1940); Ashcraft v. Tennessee, 322 U. S. 143 (1944); Haley v. Ohio, 332 U. S. 596 (1948); Watts v. Indiana, 338 U. S. 49, 50-54 (1949); Turner v. Pennsylvania, 338 U. S. 62 (1949); Fikes v. Alabama, 352 U. S. 191 (1957); Payne v. Arkansas, 356 U. S. 560 (1958). Cf. Stein v. New York, 346 U. S. 156, 181 (1953); Lisenba v. California, 314 U. S. 219 (1941). Consult Berman, Supreme Court Review of State Court "Findings of Fact" in Certain Criminal Cases, 23 So. Calif. L. Rev. 334 (1950).

[227] See, e.g., Stein v. New York, 346 U. S. 156, 181 (1953); Brown v. Allen, 344 U. S. 443 (1953).

[228] 353 U. S. 232, 250, quoting 60 N.M. 304, 319, 339, 291 P. 2d 607, 617, 630.

[229] Id. at 251.

[230] Id. at 248.

[231] Gellhorn, The States and Subversion, 367-368 (1952); Byse, A Report on the Pennsylvania Loyalty Act, 101 U. of Pa. L. Rev. 480 n. 5 (1953); Brown, Loyalty and Security, C. 6 (1958).

[232] Speiser v. Randall, 357 U. S. 513 (1958), and First Unitarian Church v. County of Los Angeles, 357 U. S. 545 (1958), take this approach to a limited degree. California grants real estate tax exemptions to veterans and churches, among others. But the exemption is conditioned upon the taxpayer taking an oath that he does not advocate the overthrow of government by unlawful means. California, after contruing the oath as extending only to those whose advocacy constitutes a criminal offense under state or federal law, upheld the denial of tax exemptions to various veterans and churches which refused to take the oath. Although the taxpayers had based their refusal to answer upon first amendment grounds, the Court, in reversing, held that the procedure violated the due process clause in that the oath did not conclusively establish the absence of improper advocacy, but merely imposed upon the taxpayers rather than the state the burden of proving non-advocacy. Placing the burden on the taxpayers was improper since an adverse determination would amount to a penalty for the exercise of speech.

Mr. Chief Justice Warren did not participate; Mr. Justice Burton concurred in the result; Justices Black and Douglas wrote concurring opinions dealing directly with the first amendment issue; and Mr. Justice Clark, the lone dissenter, objected to the construction given to the state statute by the majority, disagreed with its conclusion that the burden of proof could not be placed on the taxpayers, and argued that in any event such a position should not be taken in a case where the taxpayers had refused to take the oath.

[233] Sweezy v. New Hampshire, 354 U. S. 234 (1957). See text accompanying notes 175-87, supra.

[234] See text accompanying note 211 et seq., supra.

[235] In re Anastaplo, 3 Ill. 2d 471, 121 N.E. 2d 826 (1954), appeal dismissed and cert. denied, 348 U. S. 946 (1954); In re Summers, 325 U. S. 561 (1945).

The *Anastaplo* case, seemingly a clear case of a refusal to cooperate on grounds of conscience, is discussed in London, Heresy and the Illinois Bar, 12 Law. Guild Rev. 163 (1952); Note, The Illinois Bar and Individual Freedom, 50 Nw. L. Rev. 94 (1955).

The *Summers* case involved a bar applicant who held pacifist views concerning the use of force. The Supreme Court affirmed, 5-4, an Illinois decision denying his admission on the sole ground that his religious views prevented him from swearing in good faith to uphold the Constitution of Illinois, which contained a provision requiring service in the state militia in time of war. The overruling of United States v. Macintosh, 283 U. S. 605 (1931), and United States v. Schwimmer, 279 U. S. 644 (1929), both of which were relied on in *Summers*, by Girouard v. United States, 328 U. S. 61 (1946), undermined the authority of the *Summers* case.

[236] 350 U. S. 551 (1956).

[237] The dissenting justices, Justices Reed, Burton, Minton, and Harlan, disputed this interpretation of the New York City charter. Uncertainties with respect to the content and meaning of state law have been present in most of the cases here discussed. The Court has sometimes given great deference to the exposition of state law by the state courts *(Beilan; Lerner);*

on other occasions it has been willing to construe state statutes on matters not yet passed upon by state courts *(Garner; Adler);* and on still other occasions it has rejected interpretations of unclear state law which would sustain constitutionality *(Konigsberg; Speiser).* There has been no notable tendency to remand cases to the state courts for a clarification of uncertain state law.

[238] 350 U. S. 551, 558-59.

[239] 353 U. S. 252 (1957). Mr. Justice Whittaker did not participate.

[240] Id. at 254.

[241] Id. at 276-312.

[242] See the discussion of the *Beilan* and *Lerner* cases, infra.

[243] ". . . Obviously the State could not draw unfavorable inferences as to his truthfulness, candor or his moral character in general if his refusal to answer was based on a belief that the United States Constitution prohibited the type of inquiries which the Committee was making. On the record before us, it is our judgment that the inferences of bad moral character which the Committee attempted to draw from Konigsberg's refusal to answer questions about his political affiliations and opinions are unwarranted." Id. at 270-71.

[244] Schware v. Board of Bar Examiners, 353 U. S. 232 (1957).

[245] 357 U. S. 399 (1958).

[246] It is significant that the three dissenters in *Konigsberg* were in the majority in *Beilan,* along with Mr. Justice Burton (who was also in the majority in *Konigsberg*) and Mr. Justice Whittaker (who did not participate in *Konigsberg*). The four dissenting justices in *Beilan* were all in the majority in *Konigsberg.* Since it is likely that Justices Black and Douglas, and perhaps the Chief Justice and Mr. Justice Brennan as well, would have preferred to take a more extreme position in *Konigsberg,* holding that questions concerning political affiliation and belief are barred by the first amendment or are irrelevant to fitness, it seems safe to assume that the more moderate position was taken only to gain a majority for reversal. Since Mr. Justice Burton was the only member of the Court who was in the majority in both cases, and his vote was essential to each, it is possible that the cases represent his views. If so, his retirement and the appointment of Mr. Justice Stewart may reopen the entire matter.

[247] 357 U. S. 399, 409.

[248] 357 U. S. 468 (1958).

[249] Beilan, like Slochower, had invoked the fifth amendment privilege before a congressional committee, but unlike Slochower, Beilan was purportedly dismissed for failing to answer questions of a superior. Mr. Chief Justice Warren in his dissenting opinion in *Beilan* argued that from a realistic standpoint the case was indistinguishable from *Slochower,* since Beilan's dismissal took place only five days after he had claimed the privilege before a congressional committee while his refusal to answer his superiors occurred some thirteen months before.

The significant factual differences between *Lerner* and *Beilan* are (1) that the former, but not the latter, relied on fifth amendment grounds in refusing to answer his superiors; and (2) that Lerner was dismissed as a "security risk" while Beilan was dismissed for "incompetency."

[250] The Chief Justice and Justices Black, Douglas, and Brennan dissented in three separate opinions. Mr. Justice Brennan's dissent argued that Pennsylvania in *Beilan* and New York in *Lerner* had publicly labeled the respective petitioners as disloyal Americans and that, if they were to be discharged under security statutes, it should be through a procedure which avoided this stigma. Factually, this argument seems stronger in *Lerner* than in *Beilan.* Mr. Justice Frankfurter's separate concurrence in both cases appears to be a reply to this argument.

[251] Adler v. Board of Education, 342 U. S. 485 (1952); Garner v. Board of Public Works, 341 U. S. 716 (1951); Gerende v. Board of Supervisors, 341 U. S. 56 (1951).

[252] Wieman v. Updegraff, 344 U. S. 183 (1952).

[253] Schware v. Board of Bar Examiners, 353 U. S. 232 (1957); Konigsberg v. State Bar of California, 353 U. S. 252 (1957).

[254] See opinion of Mr. Justice Burton in Garner v. Board of Public Works, 341 U. S. 716, 729 (1951) (concurring in part and dissenting in part).